PETER CRELLAN KELLY

Reforming family law without compromising trust integrity: *Recognising wealth held in trust when reallocating family property on death or separation.*

Research paper for LAWS521

Te Kauhanganui Tātai Ture | Faculty of Law

Te Herenga Waka | Victoria University of Wellington

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I Introduction

Statute law in New Zealand provides for dividing family property on separation, as well as reallocating property in the case of death, bankruptcy and other situations. Each of these statutory interventions in property rights must interact with an unusual feature of wealth-holding in New Zealand: the prevalence of discretionary family trusts. Trusts have the potential to thwart the policies of the law, by ring-fencing assets as beyond a person's 'property'. The magnitude of the issue is illustrated by real estate, of which a greater value is owned by family trusts than by households directly.[1] Relationship property and testamentary property are two interlinked areas of New Zealand law that are currently being reformed, and this requires policymakers to grapple with how to deal with assets held in trust. Possible approaches include disregarding property in trust; reversing transactions that put property in trust; recognising that 'rights and interests' relating to a trust may have value that should be brought into account; and making orders directly altering the trusts themselves.

This paper focuses on property held in discretionary trusts, which are introduced in section II. Section III identifies two different approaches to 'property' in trust assets: the 'strict concepts of property law' that apply in the insolvency context, and the relaxed approach used under the Property (Relationships) Act 1976 (PRA). Section IV discusses attempts that have been made to 'bust trusts' within the general law.

Section V outlines the political economy of the New Zealand discretionary trust, discussing who uses the trusts and for what purposes. I then describe statutory approaches to wealth held in trust in section VI.

Section VII and VIII apply these materials to the Law Commission's recent review of the relationship property regime, and its current testamentary property reform project. In each case I support measures that would be less intrusive than the reforms that the Law Commission has contemplated. Section IX then considers whether changes to New Zealand's generic trust law statute are warranted.

These ideas are then illustrated by applying them to two paradigm cases in section X, before I conclude in section XI with a call for greater certainty and clarity in the law, by recognising that black letter rules work better than a discretionary approach for families that need to be able to move on with their lives after a separation or death.

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[1] $877b cf $612b of owner occupied dwellings and other real estate in 2018: "Household net worth statistics: Year ended June 2018" Statistics New Zealand <www.stats.govt.nz>.

II The nature of a discretionary trust

A discretionary trust is a type of express trust.[2] The core characteristics of an express trust are that:[3]

(a) it is a fiduciary relationship in which a trustee holds or deals with trust property for the benefit of the beneficiaries or for a permitted purpose; and
(b) the trustee is accountable for the way the trustee carries out the duties imposed on the trustee by law.

Trustees have a fiduciary obligation to properly consider any request by a discretionary beneficiary to receive a distribution, so it follows that the beneficiary has the reciprocal right to have such a request duly considered.[4] However, it may be that no such distributions are ever made. For that eventuality, a discretionary trust has 'final beneficiaries' who have a residual property interest.[5]

In a discretionary trust each discretionary beneficiary's equitable property interest in the trust asset pool remains unallocated,[6] while the legal title is held by the trustees.[7] Collectively, the beneficiaries are able to call for the trust property to be appointed as they see fit,[8] as "together [they have] possession of the total bundle of proprietary rights".[9] However, individual discretionary beneficiaries do not have a property

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[2] While arguably not a "term of art", the "discretionary trust" is well described in the relevant texts, see for example Alastair Hudson *Equity and Trusts* (7th ed, Routledge, Oxon, UK, 2014) at 186; Law Commission *Review of Trust Law in New Zealand: Introductory Issues Paper* (NZLC IP19, 2010), at 33 n 174, discussing the distinction between powers of appointment and discretionary trusts.

[3] Trusts Act 2019, s 13.

[4] *Gartside v Inland Revenue Commissioners* [1968] AC 553; for the "right to request payment", see *Chief Executive of Ministry of Social Development v Broadbent* [2019] NZCA 201, [2019] 3 NZLR 376 at [84].

[5] *KA No 4 Trustee Ltd v Financial Markets Authority* [2012] NZCA 370 at [17].

[6] The assets are "ownerless", per Mark J Bennett "The Illusory Trust Doctrine: Formal or Substantive?" (2020) 51 VUWLR 193 at 204.

[7] Donovan Waters "Settlor control—what kind of a problem is it?" (2009) 15 T & T 12 at 12.

[8] The trustees must terminate the trust on receipt of a notice signed by each beneficiary (discretionary or final): Trusts Act, s 121.

[9] *Re Philips New Zealand Ltd* [1997] 1 NZLR 93 (HC) at 101; provided they are all competent; *Saunders v Vautier* (1841) 4 Beav 115; Hudson, above n 2, at 182; Charlotte Beynon "The rule in Saunders v Vautier: to the 'residuary beneficiary', the spoils?" (2019) 25 T & T 963; Law Commission *Perpetuities and the Revocation and Variation of Trusts* (NZLC IP22, 2011) at [4.20].

interest in the trust corpus, merely a 'mere expectancy' or 'hope' (*spes*).[10]

As with the 'mere expectancy' associated with being a discretionary beneficiary, holding a power relating to a trust is also traditionally not held to be property.[11] Common powers include the settlor being able to add or remove discretionary beneficiaries.[12]

The most extensive power is a general power of appointment, where a person has a power to direct trustees to pay the estate to anyone, including themselves.[13] Where the law takes a substantive rather than formal approach to property, such a power is likely to be treated as giving ownership to the donee.[14] The following section compares the approach taken in insolvency proceedings to that used in family property law.

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10 *Hunt v Muollo* [2003] 2 NZLR 322 (CA); *Gartside v Inland Revenue Commissioners*, above n 4; Hudson, above n 2, at 190.

11 *Z v Z (No 2)* [1997] 2 NZLR 258, [1997] NZFLR 241 (CA) at 278; citing *Re Armstrong, Ex p Gilchrist* (1886) 17 QBD 521 at 579.

12 John Priestley "Whence and Whither: Reflections on the Property (Relationships) Act 1976 by a Retired Judge" (2017) 15 Otago LR 67 at 68.

13 Chris Kelly *Garrow and Kelly Law of trusts and trustees* (7th ed, LexisNexis NZ, Wellington, 2013) at 923; *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551, [2016] NZFLR 230 at [60].

14 "There is no doubt that while for some purposes a power was not property, for other purposes the holder of a general power could be regarded as being for all practical purposes an owner": *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd* [2011] UKPC 17, [2011] 4 All ER 704 (Cayman Islands) at [33], supported with examples from different areas of the law to [46] inclusive.

III 'Property' in trust assets: two contrasting approaches

In this section I illustrate how insolvency law takes a formalistic approach to the ownership of trust assets, while the family property on separation regime treats a combination of trust rights and interests substantively amounting to a general power of appointment as 'property'.

A Under insolvency law

Under the Insolvency Act 2006:[15]

> **property** means property of every kind, whether tangible or intangible, real or personal, corporeal or incorporeal, and includes rights, interests, and claims of every kind in relation to property however they arise.

The focus is on beneficial ownership rather than legal ownership, and so an interest that is legally owned by the bankrupt but beneficially owned by someone else is excluded,[16] while property that is beneficially owned by the bankrupt, or will be during the period of bankruptcy, is captured.[17] While the definition of property may appear broad, it is interpreted narrowly. An "interest as a final beneficiary" is a "future (albeit contingent) equitable proprietary interest", and so is 'property'; but:[18]

> A discretionary beneficiary does not have a defined or vested interest in the trust property but rather "an expectation or hope" that the trustee will exercise his or her discretion in the beneficiary's favour … [and so] a discretionary beneficiary has no proprietary interest in the trust assets …

'Property' also excludes powers in relation to a trust, because they are not a right or interest *in property*.[19] In New Zealand, the Insolvency Act 1967 referred only to "interests … vested or contingent, arising out or incident to property", and the 2006 Act has not broadened its reach.[20] By contrast, the UK legislation explicitly includes powers in the definition of property.[21]

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15 Insolvency Act 2006, s 3.

16 Section 104.

17 Sections 101–102.

18 *Erceg v Erceg* [2015] NZAR 1239 (HC) at [22].

19 Insolvency Act 2006, s 101(1)(b); see corresponding emphasis in *Clayton v Clayton [Vaughan Road Property Trust]*, above n 13, at [27].

20 *Erceg v Erceg*, above n 18, at [15]; see also Insolvency Act 2006, s 155 which would be redundant if powers were captured.

21 Insolvency Act 1986 (UK), s 283(4).

B Under relationship property law

The English and Australian approaches to dividing family property on separation each use the broad concept of the 'financial resources' available to each partner.[22] This is a functional approach to the ownership of property, which Parliament has "not chosen" in New Zealand.[23] Nonetheless, the English Court of Appeal has articulated the tension well in *Charman v Charman (No 4)* as the balancing of a:[24]

> judicious mixture of worldly realism [on the one hand] and of [, on the other hand] respect for the legal effects of trusts, the legal duties of trustees and, in the case of off-shore trusts, the jurisdictions of off-shore courts.

This led the Court to hold that:[25]

> In the circumstances of the present case it would have been a shameful emasculation of the court's duty to be fair if the assets which the husband built up in [the trust] during the marriage had not been attributed to him.

The definition of property in the PRA includes "any other right or interest".[26] Utilising the expansiveness of that phrase, in *Clayton v Clayton* the Supreme Court stated that they would take what I name the "relaxed approach":[27]

> We see the reference to 'any other right or interest' when interpreted in the context of social legislation, as the PRA is, as broadening traditional concepts of property and as potentially inclusive of rights and interests that may not, in other contexts, be regarded as property rights or property interests.

The Court specifically identified that they were switching to this relaxed approach "before turning to the power of appointment" that constituted a key issue in the case, and continuing with their property rights analysis.[28] Although the Court did not find a power akin to revocation in this case,[29] they did find a 'bundle of rights' amounting to a power of appointment, which collectively was recognised as an item of property for

[22] *Clayton v Clayton [Vaughan Road Property Trust]*, above n 13, at [28].

[23] *Clayton v Clayton [Vaughan Road Property Trust]*, above n 13, at [28].

[24] *Charman v Charman (No 4)* [2007] EWCA Civ 503, [2007] 1 FLR 1246 at [57].

[25] At [57].

[26] *Clayton v Clayton [Vaughan Road Property Trust]*, above n 13, at [76]; Property (Relationships) Act 1976, para (e) of the definition of "property" in s 2.

[27] *Clayton v Clayton [Vaughan Road Property Trust]*, above n 13, at [38].

[28] At [38].

[29] At [49].

the purpose of the PRA.[30] The court stated this recognition occurred only because it was not applying "strict concepts of property law".[31] The court declined to say whether valuing other powers was permissible.[32]

The next section sets out how this broader reading of property has found its way into core trust law, when looking at whether ownership of assets settled on trust has truly moved away from the settlor.

IV Common law trust-busting: illusion, sham, and constructive trust

A When is a trust 'no trust?' The illusory trust

One legal setting in which the 'relaxed approach to property' has appeared is when evaluating a 'no trust' argument.[33] It has been used to evaluate whether the property was ever truly alienated from its original owner at the beginning of the trust,[34] by looking at whether the powers retained were "tantamount to ownership".[35]

At the time that a trust is settled, the settlor may reserve powers relating to the trust. The settlor may also make themselves a beneficiary, or have other rights or interests relating to the trust. If the 'bundle' of retained rights and interests is too bulky, however, then it may not be certain that the settlor intended to create a trust at all, as close examination may show that they did not actually alienate the trust property from their own beneficial ownership. As Lord Kitchen observed in *Webb v Webb*:[36]

> … there can be no valid trust if, on the proper interpretation of a trust deed, the settlor has in fact retained beneficial ownership of the property purportedly settled on the trust.

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30 At [68], [80].

31 At [79].

32 At [33]; doubting *Walker v Walker* [2007] NZCA 30, [2007] NZFLR 772 at [49], a controversial case that represents the high water mark of recognising bundles of rights as property. See Frances Gush "The 'bundle of rights'—Unravelling trust principles?" (2012) 7 NZFLJ 157 at 158.

33 See Bennett, above n 6; Joel Nitikman "More about illusory trusts: is 'tantamount' to ownership the same as 'ownership'? The Privy Council takes a step too far" (2021) 27 T & T 69.

34 In the terms of the Trusts Act, s 15(1)(b)(i), whether objectively they "[indicated] an intention to create a trust".

35 Such as in *The Law Society v Dua and another* [2020] EWHC 3528 (Ch); *Webb v Webb* [2020] UKPC 22, [2021] 1 FLR 448 (Cook Islands); and *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2017] EWHC 2426 (Ch), [2017] All ER (D) 72 (Oct).

36 *Webb v Webb*, above n 35, at [76].

The logical converse of this issue is whether the beneficiaries of the trust other than the settlor have sufficient enforceable rights: "whether the trusts lacked the irreducible core of obligations owed by trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust".[37] If enforceable rights cannot be found, the 'irreducible core' of a trust will not be present.[38] As can be readily seen, if beneficial ownership of property is effectively retained by the settlor then beneficiaries will not have meaningful rights to it; and conversely if beneficiaries do have rights that constrain the trustees then effective alienation has occurred.

Nonetheless, creating an "intention to alienate" standard is vexed. The boundary is explored academically under the label of the "illusory trust" doctrine, although that label has fallen out of favour in New Zealand courts.[39] A notable feature of the Court's reasoning in *Clayton* is that no explicit statutory wording is required to broaden the definition of property in a new context.[40] *Clayton* was cited in support of the proposition that a general power of appointment is "tantamount to ownership" in the *Pugachev* decision,[41] featuring a raft of personal powers,[42] where it was held that Mr Pugachev had not alienated the beneficial ownership of the property he had purportedly settled on trust.[43] Losing sight of the PRA context, the court held that:[44]

> [*Clayton*] shows that when considering what powers a person actually has as a result of a trust deed, the court is entitled to construe the powers and duties as a whole and work out what is going on, as a matter of substance.

Through the phrase "tantamount to ownership",[45] looking past legal form to evaluate substance was also the approach in *Webb v Webb,* which mixed in reasoning based on

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[37] At [89]; see also section *II* above.

[38] Bennett, above n 6, at 222; *Armitage v Nurse* [1997] EWCA Civ 1279, [1997] 2 All ER 705.

[39] *Vervoort v Forrest* [2016] NZCA 375, [2016] 3 NZLR 807 at [37].

[40] *Clayton v Clayton [Vaughan Road Property Trust]*, above n 13, at [81], by approving of *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd*, above n 14; by comparison, for an example of where such expansion results from legislative policy, see *KA No 4 Trustee Ltd v Financial Markets Authority*, above n 5.

[41] *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev*, above n 35, at [161] (the bankruptcy was under Turkish law).

[42] Summarised in Bennett, above n 6, at 210–211.

[43] *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev*, above n 35, at [278]; see Nitikman, above n 33 which sets out a range of ways in which over-broad trusts have been attacked. See also Bennett, above n 6, at pt C.

[44] *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev*, above n 35, at [167].

[45] Usefully defined in *The Law Society v Dua and another*, above n 35, at [157] which used the phrase in pursuit of a "no trust" argument.

the UK Insolvency Act 1986.[46] As noted above, that Act includes powers in its definition of property.

The core of the 'effective alienation' analysis is to examine the rights and obligations created by the trust deed. Trusts are enforceable by their beneficiaries. The Trusts Act 2019 provides for core duties of trustees, which trust deeds cannot modify or exclude.[47] Relevantly to discretionary trusts, these mandatory duties are to know the terms of the trust;[48] to act in accordance with the terms of the trust;[49] to act honestly and in good faith;[50] to exercise the trustee's powers for a proper purpose;[51] and to hold or deal with trust property and otherwise act for the benefit of the beneficiaries, in accordance with the terms of the trust.[52] Sufficient trust information must be disclosed to beneficiaries to allow the trust to be enforced.[53] As noted at II above, discretionary beneficiaries have the right to request a distribution and have that request duly considered.[54]

Now that the Trusts Act has commenced,[55] in New Zealand it will be difficult to find that the settlor of a trust, as trustee, has complete freedom to appoint property to themselves while unconstrained by fiduciary duties to other beneficiaries.[56] That suggests little space for a finding of an illusory trust, ie no trust at all. The alternative is to argue that the legislature intended all express trusts that impermissibly modify or exclude the mandatory duties to collapse on commencement of the Act: perhaps by recharacterising the express discretionary trust as instead being a bare trust for the settlor. This possibility is left open by one of the Act's architects, former Law Commissioner Geoff McLay, who observes that the approach taken is "very [much]

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46 *Webb v Webb*, above n 35, at [77] (Cook Islands, but based on the New Zealand Property [Relationships] Act 1976).

47 Trusts Act, s 22.

48 Section 23.

49 Section 24.

50 Section 25.

51 Section 27.

52 Section 26.

53 Sections 49–55.

54 *Chief Executive of Ministry of Social Development v Broadbent*, above n 4, at [84].

55 The Trusts Act applies to all express trusts since full commencement on 30 January 2021, per s 2, and may be applied to a trust that "does not satisfy the definition of express trust but that is recognised at common law or in equity as being a trust", per s 5.

56 A synthesis of the current "tantamount to ownership" test, from Law Commission *Review of the Property (Relationships) Act 1976* (NZLC R143, 2019) at [11.4].

going to depend on the view that the judge takes of the overall attempt to establish a fiduciary relationship."[57]

If it were not for the bolstering of beneficiary rights provided by the Trusts Act 2019, the most straightforward approach might have been for New Zealand law to hold that if powers 'tantamount to ownership' are retained by the settlor, then the illusory trust doctrine operates to make the affected trusts *void ab initio*.[58] Less radically, the High Court has recently left open the possibility that such a trust would only terminate at the time the powers are exercised in a way that united the legal and equitable titles.[59] After briefly setting out the sham and constructive trust doctrines, in section V below I set out the political economy context in which courts will choose the path of the law. Because of that context, and the reality that trust deeds in New Zealand commonly reserve significant powers to the settlor,[60] my prediction is that New Zealand courts will not utilise the "tantamount to ownership" benchmark to recharacterise such discretionary trusts as the property of the settlor.

B Alleging that a trust is a sham

While seldom of practical relevance, the "sham trust" doctrine also requires mention. The doctrine applies where at 'settlement', there is a common intention between the settlor and the trustees that despite the appearance of a trust, the property will actually continue to be fully beneficially owned by the settlor.[61]

Because an allegation of sham is an allegation of fraud, it cannot be responsibly pleaded without a sound basis. It is "not permissible to make an allegation of fraud and then fish for evidence".[62] Instead, a lawyer must have reasonably credible material which appears to establish a prima facie case of fraud.[63]

Where the settlor is also the single trustee then it may be relatively easy to establish that they had no real intention to establish a trust, because only one person's intentions are at issue. However, robust evidence of a shared intention between a settlor and other individuals who are trustees will rarely eventuate.[64] The existence of

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[57] Geoff McLay "How to read New Zealand's new Trust Act 2019" (2020) 13 J Eq 325 at 336.

[58] That is, from the outset, "no trust at all": *Vervoort v Forrest*, above n 39, at [37].

[59] *White v Brkic* [2021] NZHC 919 at [15]–[16].

[60] Law Commission *Review of Trust Law in New Zealand: Introductory Issues Paper*, above n 2, at [2.53]; eg the power to appoint and remove trustees: Kelly, above n 13, at [17.48].

[61] *Official Assignee v Wilson* [2007] 3 NZLR 45 (CA) at [117].

[62] *Savril Contractors Ltd v Bank of New Zealand* [2002] NZAR 699 at [66].

[63] *Medcalf v Mardell and others* [2002] UKHL 27, [2002] 3 All ER 721.

[64] Andrew S Butler *Equity and trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at 1212; Tony Pagone "Sham trusts revisited" (2014) 20 T & T 1081 at 1083; Matthew Conaglen "Sham Trusts" (2008) 67 CLJ 176 at 186.

trust accounts showing that the trust assets are owned by the trust will generally exclude a finding of sham.[65] The party alleging a sham bears the burden of proving this,[66] using "contemporary evidence of the actions (and words) of the relevant parties showing that the trust was not intended to be genuine."[67]

However, when a trust is under "de facto control of a trust by a single trustee, who is also a beneficiary and … other trustees are clearly not involved",[68] then the assets of the trust are vulnerable to a constructive trust claim, discussed in the next section.

C Lankow v Rose constructive trust

An additional common law method for attempting to claim against property in trust is to establish, as in *Lankow v Rose*:[69]

> (a) Some contribution, direct or indirect, to the property at issue;
> (b) An expectation, on the part of the claimant, of an interest in the property;
> (c) Proof, by the claimant, that his or her expectation was reasonable in the circumstances; and
> (d) That the defendant should reasonably be expected to yield the asserted interest to the claimant.

The *Lankow v Rose* constructive trust remedy has been important for relationships that once fell outside the relationship property regime, such as defacto relationships prior to the 2001 PRA reforms.[70] The doctrine is circumscribed, however: the recent case of *Wakenshaw v Wakenshaw*[71] emphasises the high bar to be reached evidentially and for quantum of contribution.

Where the relationship property regime applies to a relationship, it provides much more straightforward and expeditious remedies than the constructive trust.[72] I discuss whether both remedies should be available within a relationship at VII below.

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[65] For example *Vervoort v Forrest*, above n 39, at [28]; *White v Brkic*, above n 59, at [18]; compare *Kwok v Rainey* [2020] NZHC 923 at [141].

[66] *Official Assignee v Wilson*, above n 61, at [111].

[67] At [110].

[68] *Vervoort v Forrest*, above n 39, at [28].

[69] Principles from *Lankow v Rose* [1995] 1 NZLR 277 (CA) 294 per Tipping J; as formulated in *Preston v Preston* [2019] NZHC 3389 at [171].

[70] Priestley, above n 12, at 75.

[71] *Wakenshaw v Wakenshaw* [2017] NZCA 252, [2018] NZAR 532.

[72] See discussion of the "fall back" 031 constructive trust proceedings in *Preston v Preston* (HC), above n 69, at [234].

V The political economy of the discretionary trust

The modern discretionary trust may appear an exorbitant privilege.[73] Because such trusts offer the remarkable ability to hold the property interests of beneficiaries unallocated,[74] the property is inaccessible to many legal claims.[75] Some critics say that the normative justifications for the untrammelled proliferation of such trusts are unconvincing.[76]

Courts avoid disturbing legal arrangements for holding property without good reason, as certainty and security of receipt are highly valued.[77] Supplementing these values, I posit that the resilience of this exorbitant privilege lies in the familiar pattern of concentrated gains to "beneficiaries" (here, those to whom the privilege is granted) and losses dispersed amongst potential voters at large.[78] While the following excerpt is discussing uneconomic projects awarded by local politicians, the same logic applies when discussing asset protection policies that increase general prices (eg through higher interest rates for all borrowers):[79]

> there are several reasons to believe that pecuniary gains are exaggerated and pecuniary losses diminished in the representative's political calculus. They relate to the concentration of pecuniary gains and the dispersion of pecuniary losses. … pecuniary losses, principally through higher prices in factor markets, are not always fully linked to the effects of increased factor demand from the project in question. Indeed, the illusion may be such that pecuniary losers are unable to distinguish the source of their losses from general price inflation. Hence there is a perceptual asymmetry between pecuniary gains and losses. Accompanying this

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[73] "With careful planning, settlors have nothing to lose and everything to gain from placing their assets in trust": Nicola Peart "Intervention to Prevent the Abuse of Trust Structures" (2010) 3 NZ L Rev 567 at 568.

[74] Law Commission *Review of Trust Law in New Zealand: Introductory Issues Paper*, above n 2, at [3.29]; *Hunt v Muollo*, above n 10; *Gartside v Inland Revenue Commissioners*, above n 4.

[75] As in *Official Assignee v Wilson*, above n 61.

[76] Mark J Bennett and Adam S Hofri-Winogradow "The Use of Trusts to Subvert the Law: An Analysis and Critique" (2021) 41 Oxf J Leg Stud 692.

[77] Jessica Palmer "What to do about trusts?" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge, UK, 2017) at 192.

[78] Sam Peltzman "Toward a more general theory of regulation" (1976) 19 The Journal of Law and Economics 211 at 214.

[79] Barry R Weingast, Kenneth A Shepsle and Christopher Johnsen "The political economy of benefits and costs: A neoclassical approach to distributive politics" (1981) 89 Journal of Political Economy 642 at 648–649, referring to Peltzman, above n 78.

> asymmetry in perception is an asymmetry in capacity to convert perceptions of gains and losses into political influence. Third, then, as Peltzman has noted in another context, gainers typically are smaller in number, more cohesive in political interest, and, consequently, better organized politically. They are capable of rewarding the local legislator for delivering the bacon in a fashion in which pecuniary losers are unable to punish.

When such privileges appear in the law, it is often instructive to look at who benefits from them, and at whose expense, as the structures of the law have distributional consequences.[80] The converse question is the political power of those who bear the cost, as "the productivity of the dollars to a politician lies in mitigation of opposition".[81] Who then, benefits from the privilege of the discretionary trust?

In 2015 a fifth of home-owning households in New Zealand held their home in a trust.[82] Current transaction data shows that approximately one in seven real estate transactions have had a trust as a purchaser.[83] The number of income-earning trusts has remained relatively stable over the last fifteen years, growing from 192,900 in 2003 to 256,500 in 2018 (year ended 31 March), with the incomplete 2019 data continuing the stable trend.[84] These data include only trusts that allocated beneficiary or trustee income; there are also 6,500 trusts with a non-active filing exemption, which will include trusts that are not regarded as earning income despite owning family homes.[85]

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80 Katharina Pistor *The Code of Capital* (Princeton University Press, Princeton, 2019) at 3.

81 Peltzman, above n 78, at 214.

82 Law Commission *Relationships and Families in Contemporary New Zealand* (NZLC SP22, 2017), at 48: specifically 19% of households lived in a home held on trust, in addition to 51% that owned the home. There are challenges in providing precise statistics, but that multiple independent sources provide comparable numbers provides comfort that the rough quantum has been captured: see "Comparison of household net worth statistics" Statistics New Zealand <www.stats.govt.nz>.

83 Each of the years ended 31 March 2018, 2019, 2020, and 2021 has been in the range 15%-17%, calculated from "Property transfer statistics: June 2021 quarter | Stats NZ" <www.stats.govt.nz> (excluding corporate purchasers such as "companies, corporate entities, government authorities, and other non-individuals"); and "Overdue request for statistical information—a Official Information Act request to Inland Revenue Department" (20 August 2021) FYI <https://fyi.org.nz>.

84 "Income of trusts IR6 returns" <www.ird.govt.nz>.

85 Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013), at 235; "Overdue request for statistical information—a Official Information Act request to Inland Revenue Department", above n 83.

A contextual factor is general residential housing stock value growth, which has been high with property prices showing a further sharp climb of 28.7% in the last year:[86]

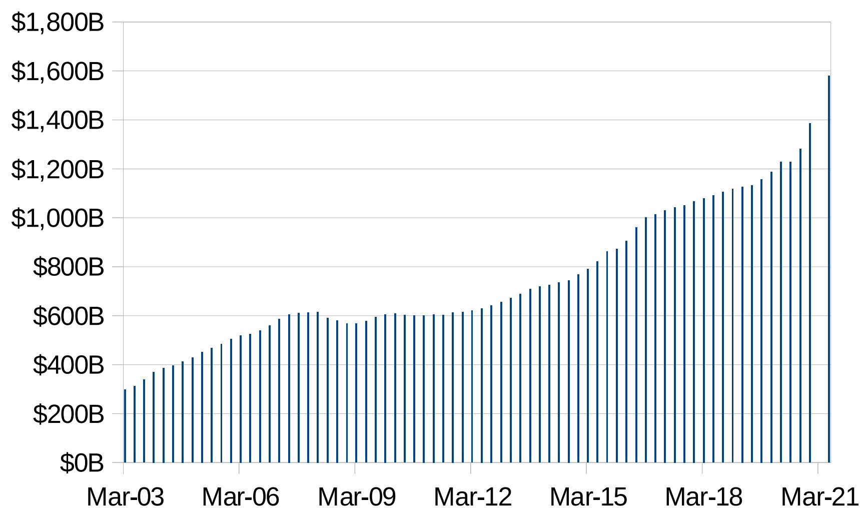

Figure 1: Value of NZ Housing Stock in $b NZD; final bar represents RBNZ stock value data at June 2020 with a scaled value adjusted by REINZ price data to June 2021.

What sort of households live in the homes held on trust? Unsurprisingly, these are wealthy households, with both median and mean net worth values 2.3 times higher than for the set of all households.[87] Reinforcing the general idea that these wealthy households are likely to be politically influential, perusing the Register of Interests shows that Members of Parliament are often involved with several trusts, and their homes and business interests are regularly held in trust.[88] The median Member is a trustee of at least one trust, and is also a beneficiary of either the same or a distinct trust.[89] While comparable interest registers are not available for the senior public

[86] "House prices and values—Reserve Bank of New Zealand" <www.rbnz.govt.nz>; "REINZ Monthly Property Report" The Real Estate Institute of New Zealand (REINZ) <www.reinz.co.nz> (strictly these data are not comparable because the housing stock includes additional units as well as price movements, but the effect will be relatively insignificant for the single interval added).

[87] Consistent in both "Household net worth statistics: Year ended June 2015" Statistics New Zealand <www.stats.govt.nz>; and "Household net worth statistics: Year ended June 2018", above n 1; in these statistics 30% of households are shown as having their home held on trust.

[88] "2021 - Current Register of Pecuniary and Other Specified Interests - New Zealand Parliament" <www.parliament.nz>.

[89] "2021 - Current Register of Pecuniary and Other Specified Interests - New Zealand Parliament", above n 88; "Summary of Amendments to Annual Returns, June 2021" <www.parliament.nz>; "Further amendments to 2020-21 Register made after June 2021" <www.parliament.nz> as at 28 September 2021. The 120 Members had beneficiary roles in 91 trusts, trustee roles in 94, and in total were involved in 128 trusts, with a median of 1 for each of trustee and beneficiary roles, and a

servants with strong influence on policy, given the demographic profile of those personnel it would be surprising if they did not also commonly make use of discretionary trusts.

A common motivation for settling a trust is to opt out of the relationship property regime when starting a relationship later in life. As retired judge John Priestley observes:[90]

> Trust mechanisms have, since 1976, proved to be a popular way of ensuring that assets which would otherwise be relationship property fall outside the pool to be equally divided should the relationship fail. This is unsurprising. Survivors of a failed relationship who have shared equally in the core assets are not attracted to the proposition that, should they repartner, failure of a second or subsequent relationship would automatically mean a further depletion of assets by 50%.

Trusts are also a vehicle for intergenerational support for housing purchases.[91] International research suggests that where high house price growth is present, encouraging intergenerational transfers within families supports higher household net wealth by encouraging younger households to buy rather than rent homes.[92]

Policymakers' familiarity with the trust structure, and a sense that it is used by 'people like us' for 'legitimate ends', provides context for why law reform proposals to allow 'trust busting' have not been implemented.[93]

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median involvement in 1 trust in any role.

[90] Priestley, above n 12, at 82; supported by Law Commission *Review of the Property (Relationships) Act 1976*, above n 56, at [57].

[91] "How to help your children get their first home in a tough market" (7 March 2020) Stuff <www.stuff.co.nz>; "Parental Support For First Home Buyers in Auckland" <www.turnerhopkins.co.nz>.

[92] Thomas Y Mathä, Alessandro Porpiglia and Michael Ziegelmeyer "Household wealth in the euro area: The importance of intergenerational transfers, homeownership and house price dynamics" (2017) 35 Journal of Housing Economics 1 at 11.

[93] Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand*, above n 85, at [19.9]; *Report of the Working Group on Matrimonial Property and Family Protection* (Department of Justice, Wellington, 1988); Matrimonial Property Amendment Bill (109–2) (select committee report) at xii explaining why the Working Group recommendation to allow access to trust capital was rejected.

The finding of this political economy analysis is that the discretionary trust is unassailably entrenched in New Zealand. There is however a natural impetus to develop policies that recognise that those who are likely to have access to trust resources are less in need than those without, and that in some cases they should be required to disgorge those resources, or at least have their access to those resources brought into account. The intrusiveness of these policies needs to be calibrated in each domain, considering the statutory context, the benefits of certainty, and respecting the property rights of beneficiaries and third parties. I catalogue current statutory approaches in the next section.

VI Current statutory approaches to trusts

A Statutory introduction

Extrajudically, Heath J has observed that:[94]

> The notion of "trust-busting" is captured in various pieces of legislation directed to differing factual situations. The policy drivers are legislative in nature; not judicial. Parliament has made a policy choice that, in certain areas of the law, the protection of assets otherwise available through use of an orthodox trust structure is unjustifiable, when measured against countervailing considerations. In each of these areas the question is: Why should the advantages of a trust structure prevail over the rights of others?

A 'value pluralism' approach to property allows robust analysis of the meaning that the law is choosing for 'property' in a given context, and analysis of what those domains of the law regard as important.[95] On the one hand, certainty of endowment for the beneficiaries of trusts is important;[96] while on the other hand, the rights of creditors are also valuable, and it is legitimate to ask whether trusts should allow people to thwart important legal obligations, leaving others to bear the costs.[97]

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[94] Paul Heath "Some Thoughts on a (New Zealand) Judicial Approach to Trust Law" (paper presented to Society of Trust and Estate Practitioners New Zealand Conference, Auckland, 29 March 2012) at 4–5.

[95] Gregory S Alexander "Pluralism and property" (2011) 80 Fordham L Rev 1017 at 1051.

[96] Palmer, above n 77, at 192.

[97] Kent D Schenkel "Trust law and the title-split: a beneficial perspective" (2009) 78 UMKC L Rev 181 at 212–213; Law Commission *Some issues with the use of trusts in New Zealand* (NZLC IP20, 2010) at [2.29].

The different ends valued by different facets of the law are not commensurate on a single scale:[98] and some values are given a lower weight in some contexts. For example, in the 'matrimonial' context, Alexander argues that "values of community and sharing, rather than personal liberty, should be paramount."[99] These values are subject to contestation over time: for example, the Law Commission's recent review on relationship property has recommended that children's interests are given a more prominent role in determining relationship property awards.[100] The Law Commission's review of trusts,[101] which led to the Trusts Act 2019, did not provide courts with a general 'trust-busting' power for courts to look beyond the form of trusts to their economic substance.[102] As a result, the value contestation inherent in such 'trust-busting' provisions needs to be freshly considered in each policy domain.[103]

B Insolvency and general property law: Insolvency Act and Property Law Act

Section III above describes how the law of bankruptcy deals with trust powers and entitlements. As noted there, the orthodox (or 'strict') view is that neither the settlor nor a discretionary beneficiary has a property interest in the trust assets. However, in some circumstances assets that a settlor has disposed of to such a trust may be subject to 'clawback' under the anti-deprivation provisions of the Insolvency Act 2006 or the Property Law Act 2007. These provisions under the general law are an important baseline to have in mind when considering the specific anti-deprivation provisions that occur in the family property context, discussed later in this paper.

The starting point under the Insolvency Act 2006 is that property that is held by a bankrupt as a trustee is not affected by the bankruptcy.[104] However, a series of provisions in subpart 7 of part 3 commencing at s 204 allow for transactions to be reversed in various circumstances. Section 204 allows any gift made in the two years before bankruptcy to be cancelled. Section 205 extends this period to five years, but only if the bankrupt was insolvent at the time. The remaining provisions of the subpart fill in the provisions to deal with matters such as transactions at under-value.

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[98] Alexander, above n 95, at 1019.

[99] At 1025.

[100] Law Commission *Review of the Property (Relationships) Act 1976*, above n 56, at ch 12.

[101] Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand*, above n 85.

[102] At [4.15].

[103] "... within individual legislative schemes": at [4.15]. The Commission did however make some specific recommendations about relationship property at ch 19, but these were not adopted.

[104] Insolvency Act 2006, s 104.

Addition clawback provisions are found in the Property Law Act 2007 Part 6 Subpart 6, which functions "to ensure that a person's creditors would not be prejudiced by a debtor's alienation of property with intent to defraud them".[105] Unusually for a New Zealand statute, this subpart has its own purpose clause, to:[106]

> enable a court to order that property acquired or received under or through certain prejudicial dispositions made by a debtor (or its value) be restored for the benefit of creditors (but without the order having effect so as to increase the value of securities held by creditors over the debtor's property).

The provisions allow transactions to be set aside by a person who is owed money, and do not have a time limit.[107] They are triggered if the transaction was made when the person owing the money:[108]

> (a) was insolvent at the time, or became insolvent as a result, of making the disposition; or
> (b) was engaged, or was about to engage, in a business or transaction for which the remaining assets of the debtor were, given the nature of the business or transaction, unreasonably small; or
> (c) intended to incur, or believed, or reasonably should have believed, that the debtor would incur, debts beyond the debtor's ability to pay.

The provisions apply to gifts, under-value transactions, and transactions made "with intent to prejudice a creditor",[109] and do not apply to bona fide transactions.[110] While the language of intention is used, in this context it has a meaning more akin to recklessness, in that no particular creditor has to be in mind and there simply needs to be knowledge of the likely consequence.[111] Compensation can be awarded instead of the property itself being returned.[112]

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[105] Heath, above n 94, at [13] citing *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433 at [86] per Tipping J.

[106] Property Law Act 2007, s 344.

[107] Law Commission *Some issues with the use of trusts in New Zealand*, above n 97, at 19.

[108] Property Law Act, s 346.

[109] Section 346(1)(b).

[110] Section 349; for discussion of s 349 see *McIntosh v Fisk* [2017] NZSC 78, [2017] 1 NZLR 863 at [80] and following.

[111] Law Commission *Some issues with the use of trusts in New Zealand*, above n 97, at [3.8]; *Regal Castings Ltd v Lightbody*, above n 105, at [53]–[56].

[112] Property Law Act, s 348(2)(b); as in *Commissioner of Inland Revenue v Clooney Restaurant Ltd* [2020] NZHC 451.

The principle for each of these provisions is to balance "the principles of autonomy and security of receipt that are so important to property doctrine",[113] on the one hand, with the fact that the interests of those who receive property free or under-value are outweighed by those who would have had the benefit of the property had the transfer not occurred. The premise is that a full retrospective view of the obligations of the transferor reveals that this was not property they ought to have disposed of.

C Trust assets in social welfare policy: Social Security Act

In the context of income support, the Ministry for Social Development has a broad discretion to take into account any assets that have been disposed of to a trust.[114] The relevant values to be balanced are set out in s 3 of the Social Security Act 2018 (emphasis added):

> (a) to enable the **provision of financial and other support** as appropriate—
> (i) to help people to support themselves and their dependants while not in paid employment; and
> (ii) to help people to find or retain paid employment; and
> (iii) to help people for whom work is not currently appropriate—because of sickness, injury, disability, or caring responsibilities—to support themselves and their dependants:
> (b) to enable in certain circumstances the provision of financial support to people to help alleviate hardship:
> (c) to ensure that the financial support referred to in paragraphs (a) and (b) is provided to people **taking into account**—
> (i) **that**, where appropriate, **they should use the resources available to them before seeking financial support** under this Act; and
> (ii) any financial support that they are eligible for or already receive, otherwise than under this Act, from publicly funded sources:
>
> …

The discretion applies where the applicant for a benefit, or their spouse, has deprived themselves of property and the result of the transaction is that they qualify for a benefit at a certain level.[115] MSD may then assess eligibility for that criterion a counterfactual basis: ie as if the transaction had not occurred.[116]

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[113] Palmer, above n 77, at 192.

[114] Law Commission *Some issues with the use of trusts in New Zealand*, above n 97, at [3.60]; Social Security Act 2018, sch 3 cl 16.

[115] Social Security Act, sch 3 cl 16.

[116] Schedule 3 cl 16; the counterfactual is bounded by the criteria, however: in *Chief Executive of Ministry of Social Development v Broadbent*, above n 4, MSD included nominal income from

In summary, the relevant goal is to prevent giving to those that should be able to look after themselves, had they not undertaken a transaction akin to the voidable transactions discussed at B above; but on an altogether more discretionary basis.

D Breadth to recognise financial resources: Legal Aid

Peart points out that when a person applies for Legal Aid, their relationship to trusts is taken into account to assess their "ability … to fund their legal proceedings".[117] The provisions that she refers to are now found in s 8 of the Legal Services Regulations 2011 (the Regulations) made under the Legal Services Act 2011, which capture the following interests of the applicant and their spouse:[118]

> …
>
> (4) Any interest in any trust or other fund (whether the applicant's interest is held solely, jointly, or in common, and whether it is vested or contingent), or any benefit that the applicant might receive in connection with any trust (for example, a discretionary trust), must be assessed with regard to—
>
> (a) how the trust arose or was created; and
>
> (b) the terms and conditions of the trust; and
>
> (c) the person or persons who have power to appoint and remove trustees or beneficiaries; and
>
> (d) the history of the trust's transactions (for example, distributions); and
>
> (e) any changes in the membership of the trustees; and
>
> (f) any changes in the class of beneficiaries; and
>
> (g) the source of income or capital that the trust receives.
>
> (5) For the purposes of subclause (4), the Commissioner may treat all or part of the assets and income of a trust as assets and income of the applicant regardless of the interest of any other person in the trust.

The context for the Regulations is that the Legal Services Act (the Act) sets maximum income and 'disposable capital' levels when defining eligiblity for legal aid. The Act's purpose is:

> … to promote access to justice by establishing a system that—
>
> (a) provides legal services to people of insufficient means; and
>
> (b) delivers those services in the most effective and efficient manner.

---

gifted assets in the assessment, and the Court of Appeal rejected that.

[117] Peart, above n 73, at 584.

[118] For the inclusion of spousal resources, see Legal Services Act 2011, sch 1 cl 4.

It follows that it is clearly "contrary to the purpose of the Act for a person who has sufficient means to pay for legal services to nevertheless get Government aid".[119] Perhaps because of the link to criminal legal aid, the Act and Regulations are drafted broadly enough to capture the "unprincipled and avaricious",[120] who may seek to conceal true ownership: thus the breadth of the definitions, and the inclusion of spousal financial resources.[121]

In the only judicial decision to address the detail of the Regulations,[122] the Legal Aid Tribunal emphasised the discretionary nature of decision-making under s 8.[123] In this case an important factor was the pattern of distributions under subs (4)(d).[124] The discretion at subs (5) was held to require consideration of the needs of other beneficiaries, in this case an apparently disabled son about whom insufficient information was before the Tribunal.[125] An unlawful condition requiring a caveat to be lodged on a property owned by the trust was rejected by the Tribunal.[126] After this course correction, this decision brings the Legal Service's regime back in line with Peart's 2010 summary of the previous legislation. It does not:[127]

> give rise to a power to remove assets from the trust. No orders are made against the trustees. The person assessed is merely prevented from asserting that they have no property, when in reality they can access property as and when they choose to do so.

Looking at the stringent criteria of the Legal Aid regime in light of current litigation costs, with the Access to Justice project noting that "it is often not cost-effective to bring a claim worth less than $100,000 in the District Court",[128] reinforces the impression that when weighing values, the Legal Aid regime prefers cost containment over access to justice. That is, the financial interests of the state are preferred to those

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119 *Legal Services Commissioner v Roest* [2015] NZHC 252, [2015] 3 NZLR 273 at [49].

120 *Petricevic v Legal Services Agency* [2011] 2 NZLR 802 (HC) at [50].

121 At [52]. This case dealt with the Legal Services Act 2000 and associated regulations, but the current provisions reflect the same policy.

122 *BN (Criminal)* [2011] NZLAT 053.

123 At [41].

124 At [45].

125 At [48].

126 At [95].

127 Peart, above n 73, at 584–585.

128 "Improving Access to Civil Justice" Courts of New Zealand <www.courtsofnz.govt.nz> at "What is the concern?".

of the beneficiaries of the trust. Nonetheless, the policy choices made in treatment of trust assets maintain the integrity of the trust, by keeping to orthodox remedies. The approach taken by the Legal Aid regime affirms the approach of allowing for the financial reality of possible access to trust assets, without expropriating those assets.[129]

E Breadth as a precautionary approach: Financial Markets Conduct Act

Part 8 of the Financial Markets Conduct Act 2013 ('FMCA') deals with enforcement, liability, and appeals. Subpart 7 of that Part then provides for orders to ensure that assets are not dissipated during an investigation or proceeding. The equivalent provisions were found in sections 60G to 60K of the Securities Act 1978.

In *KA No 4 Trustee Ltd v Financial Markets Authority*[130] the Court of Appeal considered whether despite the beneficiaries of the discretionary trust in question having no "present proprietary interest" in the trust property,[131] it could nonetheless be said to be arguable that the property was held on their behalf for the purpose of s 60H(1)(f) of the Securities Act.[132] The Court's conclusion was that the property was arguably held on the behalf of the beneficiaries, and the issue should proceed to a substantive hearing.[133]

The values that were important to the Court when creating this interpretation of the law are drawn from the purposes of the Securities Act:[134]

> to ensure that the rights of aggrieved persons to damages, compensation or restitution were not frustrated by the assets of a liable person being dealt with in a way that rendered them unavailable to meet claims.

For example, the Court felt that it would be unjust for funds to be free to flow to a wrong-doer's minor children, and thereby essentially into the wrong-doer's hands, if an "aggrieved person" might benefit from those funds.[135]

This judgment shows the benefit of explicitly utilising a new and broader concept, and layering this on top of strict property law concepts. The judgment was able to affirm

[129] This was also the result in *Legal Services Commissioner v Roest*, above n 119, which concerned the obligation to repay.

[130] *KA No 4 Trustee Ltd v Financial Markets Authority*, above n 5.

[131] At [15]–[17].

[132] At [18].

[133] At [28].

[134] At [19]; approving the reasoning of Winkelmann J in the High Court.

[135] At [26].

Australian authorities which took an orthodox view,[136] and respect the integrity of the trust, while still giving effect to the important values for this area of the law. This statutory regime illustrates greater robustness dealing with property held in trust when there is more objective reason to regard the subjects of the area law as unscrupulous.

F True unscrupulous persons: Criminal Proceeds (Recovery) Act

Birss J in *Pugachev* (discussed at IV above) described how discretionary trusts could be used by unscrupulous persons to conceal assets' true ownership.[137] How would a statutory regime approach trusts, were the settlors assumed to be unscrupulous? The Criminal Proceeds (Recovery) Act 2009 provides an answer.

The Act's purpose is to:

> (1) … establish a regime for the forfeiture of property—
> (a) that has been derived directly or indirectly from significant criminal activity; or
> (b) that represents the value of a person's unlawfully derived income.
>
> (2) The criminal proceeds and instruments forfeiture regime established under this Act proposes to—
> (a) eliminate the chance for persons to profit from undertaking or being associated with significant criminal activity; and
> (b) deter significant criminal activity; and
> (c) reduce the ability of criminals and persons associated with crime or significant criminal activity to continue or expand criminal enterprise; …

It is understandable that in this context, the law's normal approach of treating documents as establishing the legal structures that they appear to create is swept aside. The evidence accepted and rejected in leading cases suggests routine dishonesty.[138] Matching that context, we find a remarkably flexible definition of property, truly focused on the substantive rather than formal nature of arrangements:[139]

> **58 Court may treat effective control over property as interest in property**
>
> (1) If the High Court is satisfied that a respondent has effective control over property, the Court may, on an application made by the Commissioner, order that the property is to be treated as though the respondent had an interest in the property specified by the Court.

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136 *Re Richstar Enterprises Pty Ltd: ASIC v Carey (No 6)* [2006] FCA 814, (2006) 233 ALR 475.

137 *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev*, above n 35, at [174] and following.

138 *Solicitor-General v Bartlett* [2008] 1 NZLR 87 (HC) at [43]; *Brazendale v R* [2011] NZCA 494 at [21]; *Snowdon v Commissioner of Police* [2021] NZCA 336 at [50].

139 Dichotomy per Bennett, above n 6; Criminal Proceeds (Recovery) Act 2009, s 58.

(2) An order under subsection (1) may—
  (a) be made even if the respondent has no interest in the property; and
  (b) specify an interest that differs from the interest that the respondent has in the property.
(3) Without limiting the generality of subsections (1) and (2), the Court may have regard to—
  (a) shareholdings in, debentures over, or directorships of, any company that has an interest (whether direct or indirect) in the property; and
  (b) any trust that has a relationship to the property; and
  (c) family, domestic, and business relationships between persons having an interest in the property or in companies of the kind referred to in paragraph (a) or in trusts of the kind referred to in paragraph (b), and any other persons.
(4) Property that is subject to an order under subsection (1) may be included in any profit forfeiture order and in any restraining order that is made against the respondent.
(5) If the Commissioner applies for an order under subsection (1),—
  (a) the Commissioner must, so far as it is practicable to do so, serve notice of the application on the respondent and on any person who, to the knowledge of the Commissioner, has an interest in the property; and
  (b) the respondent and any other person who claims an interest in the property are entitled to appear and to adduce evidence at the hearing of the application.

This statutory regime, on the face of it, treats a power to control an asset owned by a trust as having a value equal to that asset; and control of a trust may give control over the asset. This is in sharp distinction from usual legal reasoning about the value of rights and interests relating to trusts.[140] Turning to typical cases, effective control is dealt with expeditiously: for example in five brief paragraphs in *Clifford*[141] and in one paragraph in *Filer*[142]. Despite the brevity of treatment, familiar indicia are used to identify control of the trust: in *Filer* Gilbert J, contemplating a specific property, notes the respondent settled the property on to the trust as a gift; that he was one of three trustees; that he was one of the beneficiaries and had a 'preferred' status along with another person meaning that his wishes could be given priority over those of other beneficiaries; and that he had the power to appoint and remove trustees. He also noted that the respondent had renovated the property.

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140 Tobias Barkley "Valuing Discretionary Interests and Accompanying Rights" [2013] NZFLJ 223 at 225.

141 *Commissioner of Police v Clifford* [2014] NZHC 181 at [13]–[17].

142 *Commissioner of Police v Filer* [2013] NZHC 3111 at [43] (These two cases were the only two relevant High Court cases with a positive signal in the LexisNexis NZ LexCite product as at 1 Sep 2021).

The statutory regime clearly represents the extreme end of the spectrum of remedies. Trustees are unlikely to defend the proceedings, because legal fees cannot be met out of restrained property.[143] The practical result is that in a case like *Filer*, the beneficiaries of a trust with sufficient connection to criminal offending may have their rights defeated. In a political economy sense, this outcome is not unexpected: New Zealanders are fortunate to live in a polity where those with criminal connections are not influential with policymakers. The beneficiaries do have the right to apply if such a result would cause them undue hardship, under s 61 of the Act: although they do not have an interest in the property in the usual legal or equitable sense, interest is defined broadly in the Act to include "a right, power, or privilege in connection with the property",[144] and so status as a discretionary beneficiary would be adequate as it comes with enforceable rights as set out in II above. However, their interest would be likely to be non-severable and so only subject to compensation on s 69, and as observed by Ellis J in *Briggs*:[145]

> … it is difficult to see how (in many cases) the beneficiaries' interest would be valued for the purposes of paying them "an amount equal to the value of" their interest in the trust property.

This is because, Barkley's valiant efforts notwithstanding,[146] there is not an established method for providing a valuation of discretionary interests relating to trusts. Nonetheless, the Court "must direct the Crown to pay the applicant" if a non-severable interest is established,[147] provided the applicant has not unlawfully benefited.[148] Valuing the 'mere expectancy' (*spes*) at zero would not comply with the statute, and so I submit that an award calculated using Barkley's nine criteria,[149] plus an additional criterion noted below, would be the best available method.[150]

[143] Criminal Proceeds (Recovery) Act, s 28.

[144] Section 5.

[145] *Commissioner of Police v Briggs* [2012] NZHC 2324, n 20.

[146] Barkley, above n 140.

[147] Criminal Proceeds (Recovery) Act, s 69.

[148] Section 66.

[149] Barkley, above n 140, at 225.

[150] Barkley's criteria are: (1) The intentions of the settlor; (2) the fiduciary duties of the trustees; (3) the number of beneficiaries; (4) The manner in which the power has been exercised in the past; (5) the size of trust fund; (6) any criteria, including a letter of wishes, provided by the settlor in relation to the exercise of discretion by the trustees; (7) the number and identity of default beneficiaries; (8) the existence of any other powers such as a power to reduce or enlarge the class of discretionary beneficiaries; and (9) the relationship of the beneficiaries to the settlor and the trustees. I add (10) the need of each beneficiary.

Collectively the beneficiaries' interests are worth the same as the trust corpus.[151] However, I note that Berkley did not explicitly include the need of each applicant: this would also be a relevant factor.[152] The approach used should be to notionally determine a s 69 application from each of the entire beneficiary class, and apportion the value of the trust corpus amongst those applications using the factors. Only the applicant's share would be awarded.

G Current spousal and Property (Relationships) Act remedies

Domain-specific remedies are required for relationship property law because New Zealand operates a deferred community of property model. Selected property is retrospectively made 'relationship' property by the application of the Property (Relationships) Act 1976 (PRA). Until a court order or settlement agreement under the PRA, title does not change and liabilities under the general law do not accrue.[153]

Relationship property remedies relating to assets in trusts fall into three categories. The first category involves taking a relaxed view of property, to include rights and powers relating to trusts as property – at least if, in aggregate, they amount to a general power of appointment.[154] The second category of remedies are the powers to amend or re-settle a trust in s 182 of the Family Proceedings Act 1980 and s 33(3)(m) of the Property (Relationships) Act 1976 (PRA). The third category comprises clawback and compensation provisions, found in s 44 and s 44C of the PRA.

Section 182 of the Family Proceedings Act 1980 applies only to married couples and civil union partners, where there has been a trust settlement with sufficient connection to the relationship.[155] Similar provisions occur overseas.[156] The Court has broad powers to resettle the trust so as to deliver a fair outcome.[157] There is no presumption

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[151] Section *II* above discusses collective ownership of the trust by the beneficiaries, and n 9 above sets out the authority for the proposition that collectively the beneficiaries own the trust corpus.

[152] As in *BN (Criminal)*, above n 122.

[153] Bill Atkin "What Kind of Property Is Relationship Property" (2016) 47 VUWLR 345 at 351.

[154] *Clayton v Clayton [Vaughan Road Property Trust]*, above n 13; Mark J Bennett "Competing Views on Illusory Trusts: The Clayton v Clayton Litigation in Its Wider Context" (2017) 11 J Eq 48 at 52.

[155] *Clayton v Clayton (Claymark Trust)* [2016] NZSC 30, [2016] 1 NZLR 590 at [114].

[156] Palmer, above n 77, at 196 gives as examples the Matrimonial Causes Act 1973 (Eng&W), s 24(1)(c); and the Matrimonial Proceedings and Property Ordinance (HK), s 6(1)(c).

[157] *Preston v Preston* [2020] NZCA 679, [2020] NZFLR 696 at [27]; *Clayton v Clayton [Claymark Trust]*, above n 155.

of equality.[158] The section has a strong concern with the support of children after dissolution.[159] I illustrate s 182 through my discussion of *Preston v Preston*[160] at section *X* below.

The resettlement power in s 33(3)(m) of the PRA is a much narrower power that may be used in ancillary fashion to effect the Court's orders, and it is further limited by the fact that it does not bind trustees who are not parties to the proceeding.[161]

The remaining provisions are the clawback and compensation remedies. Section 44 is broadly equivalent to the Property Law Act provisions discussed above: it requires a transfer made "in order to defeat the claim or rights" of the partner; it has an exception for bona fide receipt for value; and it allows for the property to be returned or compensation to be awarded. As with *Regal Castings*[162] for s 44:[163]

> the inquiry is directed to the disposing party's knowledge of the effect the disposal will have on the other party's rights, from which intention may be inferred, rather than to whether that party was motivated by a desire to bring about that consequence.

158 *Preston v Preston* (CA), above n 157, at [23]; *Clayton v Clayton [Claymark Trust]*, above n 155.

159 *Clayton v Clayton [Claymark Trust]*, above n 155, at [129].

160 *Preston v Preston* (HC), above n 69; *Preston v Preston* (CA), above n 157; currently on appeal: leave decision at *Preston v Preston* [2021] NZSC 42.

161 Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018) at [9.3.5]; throughout chapter 9 anomalous uses of this provision are highlighted.

162 *Regal Castings Ltd v Lightbody*, above n 105.

163 *Potter v Horsfall* [2016] NZCA 514, [2016] NZFLR 974 at [41].

In *Regal Castings*, the "critical factors" included Mr Lightbody disposing of his "only substantial asset", in secrecy, at a time when it was "doubtful" whether he was solvent.[164] The approach to intention taken in applying s 44 is very different, despite the test of intention having lineage to *Regal Castings*. The partner disposing of property does not need to understand that the property they are disposing of is relationship property.[165] Because of the entitlement to share equally in relationship property, restraints on the doctrine such as "the court [being] concerned with practical risk" do not appear to apply.[166] The result is to lose sight of the policy that:[167]

> It is not determinative that a voluntary alienation may be in circumstances which contemplate what will happen on future bankruptcy. Nor ... simply because a disposition proves in the end to have depleted the assets available to creditors, if it cannot be determined that it was made with that intent.

Before the intention standard changed, the need to show 'intention to defeat' made s 44 difficult to satisfy.[168] A consensus therefore emerged that it was an inadequate remedy.[169] However, this is not borne out by recent case law,[170] because of the effect of *Regal Castings.*[171] The consensus is therefore increasingly a holdover from before knowledge of the effect of disposition was deemed to be intent.

Section 44C may apply when s 44 does not. It applies when relationship property has been disposed of to a trust since the start of the relationship, and the effect of the transfer was to defeat the other partner's rights. The provision does not allow capital to be removed from the trust, instead preferring that compensation be awarded from property beneficially owned by the partners. Only if that is not possible may the trust be subject to an order, and then only for income and not capital.[172] As noted at *V* above, many discretionary family trusts passively hold a family home, and so this may

[164] *Regal Castings Ltd v Lightbody*, above n 105, at [14].

[165] *Kwok v Rainey*, above n 65, at [109].

[166] *Regal Castings Ltd v Lightbody*, above n 105, at [6] per Elias CJ.

[167] At [6] per Elias CJ.

[168] Nicola Peart "The Property (Relationships) Act 1976 and Trusts: Proposals for reform" (2016) 47 Victoria U Wellington L Rev 443 at 450.

[169] As reflected in Law Commission *Review of the Property (Relationships) Act 1976: Preferred Approach* (NZLC IP44, 2018) at [6.22].

[170] For example *Kwok v Rainey*, above n 65; *Potter v Horsfall*, above n 163.

[171] As foreshadowed in Law Commission *Review of the Law of Trusts: Preferred Approach* (NZLC IP31, 2012), at [17.23].

[172] Property (Relationships) Act, s 44C(2)(c).

not provide meaningful relief.[173] The limitation of s 44C to provide recourse only to trust income rather than capital was a specific legislative choice, made contrary to the recommendation of the working group that prepared the policy,[174] and so should be seen as an legitimate expression of the preference of policymakers based on the political economy of that time.

Despite Alexander's avowal of the specific collective values relevant in the relationship property domain noted at A above,[175] the values discernable in the PRA provisions appear to be largely equivalent to those in the Insolvency Act and Property Law Act provisions set out at B above. Section 182 of the Family Proceedings Act, by contrast, has an explicit focus on the needs of children,[176] and remedying "the consequences of the failure of the premise (a continuing marriage) on which the settlement was made".[177] Section 182 is recommended for repeal by the Law Commission's relationship property review, discussed in the next section.

VII Law Commission relationship property review

A Outline of the reform project

The current version of the Property (Relationships) Act 1976 ('PRA') dates from a 2001 reform. Commencing in 2016, the Law Commission undertook a review of the PRA, and related provisions such as s 182 of the Family Proceedings Act 1980. After extensive consultation, and with insights from two research reports,[178] a final report was published in 2019.[179] The Government deferred considering the Commission's recommendations until after the Commission had also completed its review of succession law, described at VIII below.

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[173] Atkin, above n 161, at [9.4.1](d).

[174] Law Commission *Review of the Property (Relationships) Act 1976*, above n 56, at [19.9]; *Report of the Working Group on Matrimonial Property and Family Protection*, above n 93; Matrimonial Property Amendment Bill (109–2) (select committee report), above n 93, at xii explaining why the Working Group recommendation to allow access to trust capital was rejected.

[175] Alexander, above n 95.

[176] Family Proceedings Act 1980, s 182(1).

[177] *Clayton v Clayton [Claymark Trust]*, above n 155, at [51].

[178] Ian Binnie, Nicola Taylor, Megan Gollop, Mark Henaghan, Shirley Simmonds and Jeremy Robertson *Relationship property division in New Zealand: Public attitudes and values A general population survey* (Michael and Suzanne Borrin Foundation, Wellington, 2018); Law Commission *Relationships and Families in Contemporary New Zealand*, above n 82.

[179] Law Commission *Review of the Property (Relationships) Act 1976*, above n 56.

While the reform proposed is substantial, for the purposes of this paper only five aspects need to be outlined. The definition of property would remain unchanged,[180] continuing to allow use of the 'relaxed view' of property but without taking an expansive view of "wider economic resources".[181] Section 182 of the Family Proceedings Act would be abolished.[182] Section 44 of the PRA would remain unchanged.[183] The approach to categorising property as separate or relationship property would change,[184] in general towards greater communalisation but excluding any pre-relationship value of a separate property family home.[185] And a new remedy would be added, which would seek to provide a "single comprehensive remedy" for situations involving trusts.[186]

B Changes to categorisation of property

The categorisation of property as separate or joint property in the proposed law, which the Commission refers to as the Relationship Property Act ('RPA'),[187] is primarily based on the 'joint venture' approach.[188] That is, the value generated by either party during a qualifying relationship must be accounted for as "fruits of the family joint venture" and will be relationship property.[189] Family acquisitions are also treated as relationship property, including property acquired in contemplation of the relationship.[190] For example, this would include a family home acquired from separate property "while the partners were dating".[191] Unlike in the PRA,[192] the family home

[180] At Recommendation 8.

[181] At [3.10].

[182] At Recommendation 66.

[183] At Recommendation 64.

[184] The draft classification clause is set out in Appendix 2 of Law Commission *Review of the Property (Relationships) Act 1976*, above n 56, at 496.

[185] At [3.73].

[186] At Recommendation 58.

[187] Clause references to the RPA are to the draft provisions found in Law Commission *Review of the Property (Relationships) Act 1976*, above n 56, at 496 and following.

[188] At 61.

[189] At [2.46].

[190] RPA, cl 10(a) and (b).

[191] Law Commission *Review of the Property (Relationships) Act 1976*, above n 56, at [3.80].

[192] Property (Relationships) Act, s 8.

will no longer be subject to equal sharing if it was separate property before the relationship was contemplated;[193] however, any increase in its value will be shared,[194] although a decrease would not be.

Aside from the family home, any increase in value in separate property of a partner will stay separate,[195] unless it is attributable to the actions of either partner in the relationship.[196] Where the value of separate property is sustained by the actions of one of the partners, that will only affect property division if the partner is the non-owning partner.[197]

C The proposed 'comprehensive' trust remedy

The proposed cl 44C of the RPA shares its numbering with s 44C of the PRA, but it has a very different ambit. As noted at VI above, s 44C applies to dispositions of relationship property, during the relationship, that defeat the rights of one partner; and provides either for non-trust property to be allocated unequally to compensate for the existence of trust property, or, failing that, for the income of the trust to be allocated to a partner. The proposed cl 44C of the RPA (attached as an appendix at 59 below) applies in three situations, of which only the first has similarities to the old provision:[198]

> where either or both partners have disposed of property to a trust at a time when the qualifying relationship was reasonably contemplated or since the qualifying relationship began and that disposition has had the effect of defeating the claim or rights of either or both of the partners under any other provision of the new Act[.]

The first change is that the starting date for a disposition has been moved back to when the qualifying relationship is "reasonably contemplated".[199] Taking into account the recent Court of Appeal judgment in *M v H*,[200] a relationship serious enough to become a qualifying relationship would need to be "actually intended" rather than "no

193 Law Commission *Review of the Property (Relationships) Act 1976*, above n 56, at [3.69].

194 RPA, cl 10(d).

195 RPA, cl 9(2).

196 RPA, cl 10(e).

197 Law Commission *Review of the Property (Relationships) Act 1976*, above n 56, at 219.

198 At Recommendation 59.

199 RPA, cl 44C(1)(a).

200 *M v H* [2018] NZCA 525, [2018] NZFLR 918.

more than a distant prospect".[201] Most obviously, this would be through plans to start living together.[202] If they had no plan to live together, then their qualifying relationship would not be contemplated, as in *M v H* marriage was not in contemplation because they had "no plan to marry".[203] Given this, the result of the drafting of cl 44C tabled by the Commission would fail to achieve the inclusiveness contemplated by the Commission's report.[204] This infringes less on settlor autonomy and reduces uncertainty, but increases the likelihood of strategic behaviour.[205] Given the validity of concerns about uncertainty and restraining pre-relationship settlor autonomy expressed by practitioners,[206] I do not advocate for further temporal expansion of the "reasonably contemplated" wording in cl 44C.

I note that the Law Commission has proposed a five year limit for an equivalent measure to prevent dispositions that defeated entitlements when considering succession law, on the basis that:[207]

> The five-year time limit reflects a period after which recipients of the property ought to be able to rely on the gift without fear that the transaction will be unwound, while balancing the needs to address transactions that have had a defeating effect. The five-year period is used for insolvent gifts under s 205 of the Insolvency Act 2006, and [for] … long-term residential care ….

This argument may also have some force in the RPA cl 44C context.

The second change is that the disposition may be of separate property, if that disposition had the effect of defeating a right. For example, a separate property family home that was settled on a trust while a qualifying relationship was contemplated, and which then increased in value, would defeat the other party's entitlement to half the home's increase in value. By contrast, the current s 44C applies only to dispositions of relationship property.

Absent from the provision, as with the current s 44C, is a requirement that the partner disposing of the asset is a beneficiary of the trust which was the subject of the

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201 *M v H*, above n 200, at [51]; Xin Y Lau "Busting Trusts When a Relationship Breaks Down?" (Unpublished LLB(Hons) dissertation, University of Otago, 2019) at 19.

202 *M v H*, above n 200, at [55].

203 At [55].

204 Law Commission *Review of the Property (Relationships) Act 1976*, above n 56, at 285.

205 At [11.78].

206 At [11.61].

207 Law Commission *Review of Succession Law: Rights to a person's property on death | He arotake i te āheinga ki ngā rawa a te tangata ka mate ana* (NZLC IP46, 2021) at [9.39].

disposition. It may be regarded as being obvious. However, it would be entirely inappropriate if a disposition was captured by cl 44C that was made to a charitable trust, or to a trust for a child's benefit where the parent was not a beneficiary. There are three reasons why such situations are more likely to occur. The first is that because house prices have risen so sharply (see V above), intergenerational transfers will become more important as a source of funds.[208] The second is that dispositions of separate property, not just relationship property, are now caught by the provision (although in these situations a claim by the other party may not be defeated). The third is that the 'trigger date' has moved to prior to the relationship. Accordingly, I recommend that a subsection (4) be added to cl 44C, stating:

> (4) This section does not apply unless, at the hearing date, a partner has benefited from the trust or is capable of being a beneficiary of the trust.

This wording is designed to avoid capturing theoretical beneficiaries with no real prospect of receiving a distribution, provided they are excluded from the beneficiary class by the hearing date and have never received a benefit from the trust.

The second two situations in which the proposed cl 44C applies are:[209]

> where trust property has been sustained by the application of relationship property or the actions of either or both partners; or
>
> where any increase in the value of trust property, or any income or gains derived from the trust property, is attributable directly or indirectly to the application of relationship property or the actions of either or both partners.

What is notable about these provisions is that jurisdiction is granted to interfere with trusts where the trust property is sustained by a partner, even if that trust property would otherwise be the sustaining partner's separate property. For example, imagine that a partner, Bob, owned a scale-model diesel locomotive that was housed on a club track at the local park. Later, he starts a relationship with Joe. During the relationship Bob spends a lot of time maintaining the locomotive, and it therefore maintained its value. Without the maintenance the locomotive would have fallen into disrepair and become valueless. At the end of the relationship the locomotive had the same value as at the start. Here, despite the fact that Bob has spent a lot of his time 'sustaining' his

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208 "Many homeowners couldn't afford to buy their houses if purchasing now" (7 September 2021) RNZ <www.rnz.co.nz>; Mathä, Porpiglia and Ziegelmeyer, above n 92.

209 Law Commission *Review of the Property (Relationships) Act 1976*, above n 56, recommendation 59.

separate property, he does not need to account for that time for PRA or RPA purposes, and the locomotive continues to be owned entirely by Bob.[210]

Let us now imagine that the locomotive was owned by a trust that Bob controlled in a *Kain v Hutton*[211] sense. In this case, Bob's actions maintaining the locomotive would bring the trust within the scope of cl 44C.[212] This applies even though but for the trust, the locomotive would be separate property. This anomaly should be resolved by moving the requirement in cl 44C(1)(a) that an "effect [be caused] of defeating a claim or right of either or both of the partners under this Act" up one level, so that cl 44C (1) provided that:

> This section applies if the court is satisfied that one of the following actions had the effect of defeating a claim or right of either or both of the partners under this Act—

This change also avoids the possibility of granting relief in the situation that "but for" the trust, no relationship property entitlement would have arisen: for example, a trust settled by a third party. It is not within the ambit of the RPA to capture imputed value donated by partners to third parties.[213]

The foregoing deals with cl 44C (1). Clause 44C (2) provides comprehensive amendment and resettlement power relating to the trust, which the court may use if it considers it just in the circumstances. The Auckland District Law Society submitted that:[214]

> any remedies should be limited to the extent of the relationship property within the trust that the partner would have been entitled to had the disposition of property not occurred.

Providing such a cap on remedies would provide certainty and is desirable.[215] Implementing this submission, with adjustments to reflect the structure of cl 44C as amended above, could be achieved by appending to subsection (2):

> provided, however, that the orders made may not go beyond restoring a partner to the position they would have been in had the disposition of property,

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210 Property (Relationships) Act, s 17; RPA, cl 10(e).

211 *Kain v Hutton* [2008] NZSC 61, [2008] 3 NZLR 589 at [22].

212 RPA, s 44C (1)(b).

213 Lau, above n 201, at 28.

214 Law Commission *Review of the Property (Relationships) Act 1976*, above n 56, at [11.60].

215 Atkin, above n 161: chapter 9 is replete with examples of the Family Court overstepping principled bounds when intervening in trusts.

application of relationship property, or action of a partner that defeated their rights referred to in subsection (1) not occurred.

Clause 44C (3) deals with the matters that must be considered when deciding how to use the power at (2). The matters listed to be considered are appropriate, but insufficient. I propose that the following additions be made as factors that must always be considered at cl 44C (3):

(c) the relative value of each partner's rights and interests in the trust, along with the value of each other beneficiary's interest, valued using the principle that in aggregate the value of all beneficiaries' interests (even if merely the value of the 'hope' of a discretionary beneficiary, which shall be valued) sum to the value of the trust; and
(d) the purpose of the trust, and all other matters that would be relevant considerations for the trustees were they to be deciding whether to make a distribution to each partner at the date of separation.

The reason that I believe these additions are needed is that it is important to prevent the court from removing value from the trust that has, in practice, been alienated. The remedy at cl 44C is cumulative with the remedy at s 44, which will be preserved. Accordingly, any dispositions of relationship property that are made with knowledge that they would defeat the other partner's interests are already recoverable. This is a supplementary provision, and it is important that the provision respects the interests of third-party beneficiaries. This would address Professor Peart's reservation that the interests of all beneficiaries need to be considered.[216]

A methodology that a court could use to value the interests of discretionary beneficiaries, which of course have a nil value under traditional approaches, is set out at VI above when discussing the Criminal Proceeds (Recovery) Act.

D Complementary changes

A final observation on the Commission's proposals is that by repealing s 182 of the Family Proceedings Act 1980, keeping s 44 of the PRA, and implementing the new cl 44C, the Commission has sought to create a comprehensive set of trust remedies. It is also an opportunity to reduce pressure on the interface with trust law. I suggest three further changes that would assist.

Firstly, I propose extinguishing the *Lankow v Rose*[217] constructive trust cause of action where the situation giving rise to the claim has a proximate connection to a qualifying

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216 Law Commission *Review of the Property (Relationships) Act 1976*, above n 56, at [11.61].

217 *Lankow v Rose*, above n 69.

relationship under the RPA. This would help to fulfil the principle that "disputes should be resolved as inexpensively, simply, and speedily as is consistent with justice".[218] *Preston v Preston* provides a salutatory example of a judge lamenting that related PRA and constructive trust claims have resulted in proceedings being relocated to the High Court from the Family Court, with consequent unnecessary cost and delay.[219] The remedy should be preserved for types of property that will not be subject to the RPA, such as Māori land.[220]

Secondly, because cl 44C of the RPA is a bespoke regime that provides a comprehensive remedy for trusts, the definition of property in the RPA does not require a relaxed lens when looking at trusts. The Commission's report notes that the relaxed lens brought by *Clayton v Clayton* has caused uncertainty in the law, but that recent cases:[221]

> suggest that powers only constitute property under the PRA if they allow unfettered control of trust property, unconstrained by fiduciary duties.

That is consistent with the case law set out at III above. To provide certainty and emphasise the comprehensive nature of the cl 44C remedy, the following should be added to the definition of **property** in the RPA, after the list of six categories of property notoriously concluding with "(e) any other right or interest":

> provided however that no right or interest (including a combination of rights and interests) relating to a trust shall be property for the purposes of this Act unless it is also property for the purposes of the Insolvency Act 2006, except where a combination of rights and interests provides unfettered control of a trust, unconstrained by fiduciary duties.[222]

Removing the scope for 'bundle of rights' arguments will reduce litigation costs and increase certainty. The breadth of the existing definition will otherwise be retained to preserve the flexibility of the law, allowing for novel items of value such as income-earning YouTube channels to be accommodated.[223]

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[218] Property (Relationships) Act, s 1N(d); principle to be retained in the new statute: Law Commission *Review of the Property (Relationships) Act 1976*, above n 56, at [2.60](h).

[219] *Preston v Preston* (HC), above n 69, at [234]–[235].

[220] Law Commission *Review of the Property (Relationships) Act 1976*, above n 56, at [70].

[221] Law Commission *Review of the Property (Relationships) Act 1976*, above n 56, at [11.4].

[222] An alternative formulation of the exception could be "except for beneficial powers of appointment that provide a partner the power to appoint trust property to themselves", based on Law Commission *Review of Succession Law*, above n 207, at [9.45](e).

[223] Law Commission *Review of the Property (Relationships) Act 1976*, above n 56, at [3.9].

Finally, I propose strengthening the process for contracting out of the PRA. More robust contracting out provisions will reduce trust-related disputes for two reasons. Firstly, the Law Commission propose that "partners should be able to agree not to make any claim under amended section 44C for the purposes of contracting out of or settling claims under the new Act."[224] Secondly, because trusts and contracting out agreements are alternative ways of opting out of the PRA regime,[225] reducing the scope for contracting out agreements to be set aside will reduce demand for trusts. I have previously proposed a strengthened contracting out process which requires disclosure of trust interests at the time of contracting out.[226] Along with that, I have proposed providing greater certainty by changing the "serious injustice" standard for setting aside agreements to an "exceptional hardship" standard,[227] as applies in the model European spousal property regime.[228] These changes would further reduce pressure on the interface between the family property and trust law domains.

This ends the discussion of the family property regime that applies on separation. In the next section, I discuss the Law Commission's proposals on the property regime that applies on death.

VIII Law Commission review of rights to property on death

This section describes the current approach to family property on death, and then comments on the Law Commission's reform proposals.

A Current regime

Succession law currently sits astride the 'strict property law' and 'relaxed approach' regimes.

The general principles of estates set out in the Wills Act 2007 and Administration Act 1969 are premised on the strict law of property. Indeed, the law of equity has developed intertwined with the laws of succession, and so they are mutually reinforcing. Those two pieces of legislation represent the starting point of testamentary freedom in New Zealand's system of succession law.

[224] At Recommendation 63.

[225] At [57].

[226] Peter C Kelly "Contracting Out Rules for Family Income Sharing Arrangements: Providing Certainty and Protecting the Vulnerable" (2021) 52 VUWLR 89 at 108.

[227] At 97.

[228] Property (Relationships) Act, s 21J; Katharina Boele-Woelki and others *Principles of European Family Law Regarding Property Relations Between Spouses* (Intersentia, Cambridge, UK, 2013) at 348.

Taking as a basis the "strict concepts of property law" regime and the starting point of testamentary freedom, the Family Protection Act 1955 (FPA) allows claims against the estate of a deceased person for maintenance, by a limited set of people such as de facto partners, spouses, and grandchildren, based on the premise that those people may have moral claims that over-ride testamentary intention.[229]

The Law Reform (Testamentary Promises) Act 1949 (TPA) starts from the same strict property law base, but dramatically loosens the rules of contract that determine when promises are given effect. Requirements are dramatically relaxed both for the nature of the promise (if any), and the timing of consideration.[230] Claims under this Act take precedence over Family Protection Act claims.[231]

The Property (Relationships) Act 1976 (PRA), from its 2001 reforms, operates cross-cutting all the legislation listed above. It operates so as to ensure that "the survivor is no worse off than the party who has ceased living with the other spouse or partner".[232] The Act operates as a floor, because the survivor can make a choice between the provision they would receive by virtue of the legislation above, or the PRA.[233] As noted above, the PRA allows claims beyond "strict concepts of property law".[234]

B Overview of the proposed regime for property on death

The Law Commission's Issues Paper 46 was published in April 2021, and sets out its proposed approach to the reform of succession law.[235] The working proposal is to create a new statute that replaces the FPA, TPA, and the relevant provisions in Part 8 of the PRA.[236] Part 8 of the PRA would be repealed.

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[229] *Wood-Luxford v Wood* [2013] NZSC 153, [2014] 1 NZLR 451, [2014] NZFLR 483 at [22]; *Family Law Service* (online ed, LexisNexis) at [7.901].

[230] *Family Law Service*, above n 229, at [7.934.02].

[231] At [7.935.07].

[232] At [7.430].

[233] Property (Relationships) Act, s 61.

[234] *Clayton v Clayton [Vaughan Road Property Trust]*, above n 13, at [79].

[235] Law Commission "Review of Succession Law: Terms of Reference" (1 July 2019) Law Commission <www.lawcom.govt.nz>; Law Commission *Review of Succession Law: Rights to a person's property on death*, above n 207.

[236] Law Commission *Review of Succession Law*, above n 207, at [1.41].

Whether basing the provisions in the new regime on the current PRA Part 8, or the Relationship Property Act (RPA) as proposed by the Commission,[237] a decision is required whether for succession law, the 'relaxed' view of property that is taken in the context of relationship property is appropriate. It may be that the strict approach used in an insolvency context is a better fit.

I infer from the issues paper that the intention is to take a strict view of property in the new regime, with the specific exceptions of the *Clayton* scenario, and specific anti-avoidance mechanisms.[238] The issues paper refers to property that might fall outside an estate including:[239]

> powers of appointment or powers to control a trust that have not been exercised by the deceased during their lifetime.

With a footnote stating:

> See also *Clayton v Clayton* … [where the] Court held Mr Clayton's collection of powers under the trust deed amounted to property.

The difficulty is that this statement does not recognise that *Clayton* was specifically taking a relaxed view of property, based on the specific definition of *property* in the PRA.[240] As set out at III above, the Court would not have made the same holding in an insolvency or succession context.[241] However, the matter is discussed further in the Commission's anti-avoidance options, which I address in the next section.

C The notional estate approach

An approach devised in Australia, although not implemented except in New South Wales, mitigates avoidance of family provision obligations using a 'notional estate' approach, where "certain property falling outside the estate is deemed to be part of the estate for the purpose of meeting family provision claims".[242] In Canada, most jurisdictions have no anti-avoidance mechanisms, but a small minority use such a 'notional estate' approach. England uses a notional estate approach, while Scotland does not and has strongly rejected it.[243]

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[237] Law Commission *Review of the Property (Relationships) Act 1976*, above n 56.

[238] Law Commission *Review of Succession Law*, above n 207, at [9.17].

[239] At [9.5](e).

[240] *Clayton v Clayton [Vaughan Road Property Trust]*, above n 13, at [38].

[241] At [79].

[242] Law Commission *Review of Succession Law*, above n 207, at [9.34].

[243] At [9.35].

IP46 describes three options for anti-avoidance. The first is a description of the status quo that does not contemplate recourse to property going beyond the conventional strict approach.[244] This option would not extinguish constructive trust claims.[245]

The "limited clawback" mechanism also does not raise the possibility of valuing trust powers. It provides for a five-year time limited clawback for dispositions that have the effect of defeating entitlements under the regime; a clawback equivalent to s 44 of the PRA for dispositions intended to defeat entitlements; and a clawback in the case of property passing through survivorship to a joint tenant.[246] Because these remedies would be more limited than those in cl 44C of the proposed RPA, it would sometimes be advantageous for a surviving partner to opt for division under the RPA to gain access to the RPA remedy.[247]

The clawback for dispositions intended to defeat entitlements requires further consideration. The history of such provisions is derived from fraudulent dispositions.[248] Now that a disposition with knowledge of its defeating effect on a creditor has been held to be an intent to defeat,[249] and in the usual way this principle has been transposed into family law without the stringency used in a commercial setting,[250] it is important to consider what 'intention' means in the context of death. The parties whose interests might be defeated by a disposition are plain: claimants under the Family Protection Act and the Testamentary Promises Act, who are likely to have a close relationship to the deceased. That a disposition would reduce the amount available to them in the estate seems incontrovertible. This remedy, without a time limit, may be over-inclusive and restrict freedom of action too much. It may be that a strengthened requirement for a subjective "improper intention to defeat" would better effect the legislative policy.[251]

Finally, an option for a "comprehensive clawback mechanism" is included. In addition to the two disposition clawback provisions tools in the "limited clawback mechanism", this option explicitly refers to revocable trusts, as well as "beneficial powers of appointment that were exercisable by the deceased during their lifetime,

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[244] At [9.37].

[245] At [9.38].

[246] At [9.39]; with my inference from *Potter v Horsfall*, above n 163.

[247] Law Commission *Review of Succession Law*, above n 207, at [9.44].

[248] Heath, above n 94, at [12].

[249] *Regal Castings Ltd v Lightbody*, above n 105.

[250] *Potter v Horsfall*, above n 163.

[251] By analogy from Heath, above n 94, at [13].

including any power the deceased had to appoint trust property to themselves".[252] It is noted that this is intended to refer to the sort of powers that Mr Clayton had in *Clayton v Clayton.*[253] Orders available would include the ability to transfer property out of trust, or an equivalent value.[254]

D Discussion

My view is that the comprehensive clawback mechanism causes too much disruption to legal arrangements. This can be seen in particular by considering the inclusion of powers of revocation and "powers of appointment … exercisable … during [the deceased's] lifetime",[255] in conjunction with the 'order of transfer' remedy.[256] The fact that a power may have been available during a person's lifetime does not mean that it is property, or has value, after they are dead. Opening the door to such a power being reanimated and transferred, for example to the deceased's former spouse, creates great risk to the integrity of legal arrangements. This may cause substantial prejudice to the interests of beneficiaries.

The "equivalent value" remedy is similarly problematic if a relaxed approach to property is taken. The literature on the valuation of trust 'bundles of rights' is largely premised on the influence that settlors can have to arrange for property to be distributed to themselves: both through their wishes, and any power to dismiss and appoint trustees.[257] Attempting to apply those PRA-derived methods in the context of death would be perverse, because the dead cannot wield such influence.

In conclusion, relationship breakdown and succession are very different domains. The typical relationship that ends in death will feature older partners, and will be less likely to feature dependent children. Wills are a deliberate and formalised method of planning for property division. The Commission has articulated the policy goals of sustaining property rights,[258] and respecting the way that the "deceased has structured their property affairs" including to transmit property "not through their estate".[259]

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[252] Law Commission *Review of Succession Law*, above n 207, at [9.45].

[253] At 147 n 43; *Clayton v Clayton [Vaughan Road Property Trust]*, above n 13.

[254] Law Commission *Review of Succession Law*, above n 207, at [9.47].

[255] At [9.45].

[256] At [9.47].

[257] Gush, above n 32, at 160; or the "relationship to the settlor", Barkley, above n 140, at 225.

[258] Law Commission *Review of Succession Law*, above n 207, at [1.25].

[259] At [3.28].

These goals argue for the application of "strict concepts of property law", without adopting either of the two clawback mechanisms.

The Commission identifies criteria for good succession law.[260] Aside from the general objectives, these are "sustaining property rights and expectations", "promoting positive outcomes", and "promoting efficient estate administration and dispute resolution". On the first of these three criteria any point on a spectrum of intrusiveness, restriction of freedom, and "clawback" can be chosen. However, if the end of the spectrum chosen is minimum intrusiveness, minimum restriction, and minimum clawback then the second and third criteria will best be satisfied. That is because the scope for dispute and litigation will be much reduced. My view is that certainty and prevention of legal conflict are the best gifts that we can give families when they have lost a loved one.

IX Should generic trust law be changed?

As set out at IV above, there will be cases where apparent trust structures can be recharacterised as 'no trust', because the trust property was not truly alienated. However, other situations will arise when a valid trust exists, but the settlor has significant influence. The law will sometimes confront cases like *Vervoort v Forrest*,[261] featuring:[262]

> an alpha male trustee who has treated a family trust as being in large measure an extension of himself … [where Asher J acknowledged] … traditional trust principles of unanimity and non-delegation … "must bend to the practical realities when one trustee is in absolute control of all trust activities and the other trustees have effectively abdicated their trustee responsibilities."

What then, is the correct conceptual response to the *behaviour*, as opposed to the existence of the formal powers? It cannot be simply that a settlor who is also a trustee can unilaterally revoke the trust through appointing trustees who will ensure poor administration, as the emerging sham doctrine would suggest (as argued in *Vervoort*[263]). The trust in *Vervoort* had beneficiaries other than Mr Duffy.[264] The trustees' abdication of duty was a breach of the trustees' duties to the beneficiaries.

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260 At [1.22].

261 *Vervoort v Forrest*, above n 39.

262 Priestley, above n 12, at 84; citing *Vervoort v Forrest*, above n 39, at [62].

263 *Vervoort v Forrest*, above n 39, at [31].

264 At [27].

The 'remedy' cannot be to nullify the duties and hand the property back to the settlor,[265] from whom (in this case) it could be claimed by Ms Vervoort. As Palmer says, the:[266]

> introduction of control by the settlor [over a valid trust] does not affect the validity of the trust or the property rights of the trustee and beneficiary … [or] grant the controller title.

In the extreme cases, the beneficiaries can assert themselves. In *Official Assignee v Wilson*, although Mr Reynolds seemed to have factual control, he was not a beneficiary of the trust. Mr Reynold's children and grandchildren, assuming they were all fully competent, could have terminated the trust and taken absolute ownership of the property.[267] Neither Mr Reynolds nor the trustees would have had any legal power to resist.

The state does have an interest in the proper administration of trusts. If a criminal standard is met, it can take action. Section 229 of the Crimes Act 1961 provides:

> **229 Criminal breach of trust**
>
> (1) Every one is guilty of a criminal breach of trust who, as a trustee of any trust, dishonestly and contrary to the terms of that trust, converts anything to any use not authorised by the trust.
>
> (2) Every trustee who commits a criminal breach of trust is liable to imprisonment for a term not exceeding 7 years.

A punitive civil remedy that is enforceable by beneficiaries is conceivable. For example, the Trusts Act 2019 could be amended to provide that:

> **130A Powers of court in case of sustained gross negligence**
>
> (1) Where a trustee shows sustained dishonesty, wilful misconduct, or gross negligence that has prejudiced beneficiary interests then the court may make one or more of the following orders:
>
> (a) amend the trust so that if the trustee was a beneficiary of the trust, they are no longer a beneficiary:
>
> (b) remove the trustee under section 112:
>
> (c) remove any rights or powers that the trustee may have in relation to the trust, for example a power to remove trustees.
>
> (2) An application under this section may be made by any beneficiary.

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265 *Official Assignee v Wilson*, above n 61, at [70].

266 Jessica Palmer "Dealing with the emerging popularity of sham trusts." (2007) 1 NZ L Rev 81 at 106.

267 *Official Assignee v Wilson*, above n 61, at [3]; Trusts Act, s 121; *Saunders v Vautier*, above n 9; Beynon, above n 9; Law Commission *Perpetuities and the Revocation and Variation of Trusts*, above n 9, at [4.25].

This remedy would would have a similar effect to the errant trustee resigning, and unilaterally disclaiming all of their rights and interests in relation to the trust. It could be argued that there would be a principled basis for stopping a person benefiting from a trust after abusing the structure; and the fact that the property would be held for the benefit of the other beneficiaries has a sound element that the settlor has made their bed and must lie in it.[268] It seems to me that a an "emerging sham", ie a trustee treating the trust property as their own with flagrant disregard for their obligations to the other beneficiaries, would be captured by this provision.

I am not convinced that the addition of this remedy would be better than the status quo. However, it is the best solution that I can offer to the layperson's intuition that if a person controls property, they should be able to be forfeit the property if they incur liabilities.

In the next section I leave this question, and move on to apply current and proposed relationship property rules to two paradigmatic fact scenarios.

X Paradigm cases

Analytically, identifying paradigm cases has risks. This continues to be true even if the paradigm cases are based on the facts of previous legal cases as is the convention in legal academic writing. Such cases cannot be relied upon to represent the prevalence of specific family situations: for that, we must seek out research such as that utilised by the Law Commission relationship property law review.[269] Paradigm cases can be created either so as to neutralise important contextual factors such as gender roles, or else emphasise them so as to 'tug at the heart strings'; and either way can function as "misbegotten persuasion devices".[270] Nonetheless, well constructed thought experiments can function as 'intuition pumps' to help illustrate the correct answers to otherwise difficult problems, by showing the consequences of particular theories.[271]

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[268] That is, that "choices of legal form have to have consequences": McLay, above n 57, at 328.

[269] Law Commission *Relationships and Families in Contemporary New Zealand*, above n 82.

[270] Daniel C Dennett *Intuition Pumps And Other Tools for Thinking* (W W Norton & Company, New York, NY, 2014) at 4.

[271] At 5.

A Disposition of relationship property within relationship

A paradigmatic scenario that is poorly handled by the current law is where a defacto relationship begins, let us say between Jack and Jill; a family home is acquired from Jack and Jill's relationship property; the home is then transferred to a discretionary trust; the partners live in the house without paying rent; and the relationship then ends without the parties marrying or entering a civil union.[272] Jack moves out, and Jill continues to live in the house. The discretionary trust is controlled by Jill in a *Kain v Hutton* sense,[273] but with sufficient trammels on her powers that *Clayton*[274] does not allow Jack to claim that her rights and powers have financial value. Apart from the family home, there are no other joint or separate assets to speak of.

In this scenario, Jack would want to receive half the value of the house, promptly. Had the partners been married or in a civil union, s 182 of the Family Proceedings Act 1980 would provide a straightforward remedy, albeit two years later on dissolution. However, because they are not, Jack must seek redress under the PRA.

Section 44 of the PRA will provide a remedy, provided that Jill knew that the transfer of the house into the trust would hinder Jack's rights to the house: that would be sufficient to show that the disposition was made "in order to defeat the claim or rights" of Jack, as she would know that would be a consequence.[275] As outlined above in VI, it has been argued that establishing the requisite knowledge is still a "hefty burden",[276] but I have argued this is not borne out by recent cases. However, if Jill states that she had no idea that the transfer would defeat his rights, and that is accepted by the Court, then s 44 of the PRA will not assist.

That leaves s 44C. Here s 44C(1)'s requirements are made out: there has been a disposition of relationship property; the effect of the disposition is to defeat the rights of one of the partners; and s 44 does not apply. However, the remedy in s 44C(2) is inadequate, because there will be insufficient relationship or separate property from which to award compensation;[277] and the trust has no income.[278]

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[272] See general discussion of cases and outcomes in Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand*, above n 85, at 235.

[273] *Kain v Hutton*, above n 211, at [23].

[274] *Clayton v Clayton [Vaughan Road Property Trust]*, above n 13.

[275] For example, in *Potter v Horsfall*, above n 13, the transferor had experience with relationship property transactions and was a property developer, so knowledge could be inferred (at [42]).

[276] Peart, above n 168, at 450.

[277] Clause 44C(2)(a) or (b).

[278] Clause 44C(2)(c).

While this scenario is not the only issue of concern raised during the Law Commission review of the PRA, it is clearly one where the law needs to provide a remedy.[279] The challenge is to craft a reform that balances the values involved correctly.

Clause 44C of the RPA, as proposed by the Commission,[280] clearly covers this case as there has been a disposition with the effect of defeating a claim.[281] The court would be likely to order the trustees of the trust a sum of money that represents half of the value of the home.[282] In coming to this conclusion, the factors in subs (3)(a) would be considered, with the only factors that might argue against this outcome being if Jack had given informed consent to the transfer, and whether the trust was intended to meet the needs of any minor or dependent beneficiaries. Notably, the court would not be specifically directed to consider the interests of any other beneficiaries.

The amendments proposed at VII above (shown in the Appendix at 59 below) would not be expected to change this outcome. While the court would be directed to consider the value of Jane's interest in the trust relative to the other beneficiaries and the purpose of the trust, it is likely that the decision would be the same because the extent of her control of the trust would indicate that her interests were intended to prevail over those of the other beneficiaries.

B Disposition of pre-relationship property

I illustrate the disposition of pre-relationship property using *Preston v Preston*[283]. In 2004, Grant Preston settled a family trust, the GPFT.[284] The GPFT purchased a residential section and constructed a house on it 'the family home'.[285] This was completed in mid 2007, and became Grant's home.[286] From 'early to mid-2007' Grant and Katharine commenced a relationship,[287] which I infer was sexual and 'intense but

[279] See for example the proposal at Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand*, above n 85, at [19.16].

[280] Law Commission *Review of the Property (Relationships) Act 1976*, above n 56, at 503.

[281] Clause 44C (1)(a).

[282] Subclause (2)(c).

[283] *Preston v Preston* (HC), above n 69*; Preston v Preston* (CA), above n 157; currently on appeal: leave decision at Preston v Preston (SC), above n 160.

[284] *Preston v Preston* (HC), above n 69, at [8].

[285] At [9].

[286] At [13].

[287] At [11].

secretive'.[288] Their relationship reached the threshold of a qualifying relationship in March 2009.[289] Each had children from previous relationships.[290] Grant's two children were the final beneficiaries of the GPFT.[291]

The case does not record the value of the family home when built: for these purposes we will assume it was $560,000.[292] In October 2009 Katharine and her daughter moved into the family home.[293] In February 2010 Grant added "any wife or widow for the time being of the settlor" and the de-facto equivalent as a class of discretionary beneficiary of the GPFT.[294] At this time he and Katharine were engaged;[295] they were married in December 2010.[296]

At no time during the relationship did the couple have a joint bank account.[297] Grant and Katharine separated in September 2015.[298] The hearing date was July 2019. Hearing dates are used for valuation purposes, so I will assume a hearing date value of $742,000 for the family home.[299]

Section 182 of the Family Proceedings Act was engaged by the addition of the beneficiary class to the GPFT in 2010.[300] However, the discretion to intervene in the

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288 At [12].

289 At [72].

290 At [4], [8].

291 At [8].

292 "Free property data for 63/61 Hillcrest Road, Whakatane" <homes.co.nz>; note that this is a representative home in The Fairway, not the home in question.

293 *Preston v Preston* (HC), above n 69, at [24].

294 At [29].

295 At [23].

296 At [1].

297 At [53].

298 At [1].

299 Property (Relationships) Act, s 2G(1); "Free property data for 63/61 Hillcrest Road, Whakatane", above n 292.

300 *Preston v Preston* (CA), above n 157, at [22].

trust was not exercised, because the marriage was of relatively short duration,[301] Katharine had already benefited from the trust in an enduring way,[302] and because:[303]

> this is not a case where an order under s 182 is appropriate, given the original objects of the GPFT (Mr Preston's children) remain the fundamental raison d'être for the GPFT, all the GPFT assets were acquired by Mr Preston well ahead of the relationship, were vested in the GPFT by Mr Preston before the de facto relationship with Mrs Preston began, and were not contributed by, or to by, her [sic]. It is therefore a case altogether unlike … [those] where relationship property shifted after marriage into a trust.

Under the Law Commission's proposed cl 44C the court would have jurisdiction to make an order against the trust. While the section was placed in trust before the relationship was contemplated, Katharine and Grant each enhanced it.[304] Two issues would depend crucially on whether the Commission's interpretation of the qualifying relationship being "reasonably contemplated", or the more restrictive interpretation I have argued for above, is correct. The first is whether any disposition was made to the trust (subs (1)(a)): I infer that as the property reached completion in mid 2007, Grant was likely to have personally paid for construction costs. This was during a time that Grant and Katharine were in a sexual relationship, but Katharine had not yet stopped her preceding sexual relationship. The second is the amount of enhancement from the actions of the partners during the period of time where the qualifying relationship was contemplated but had not commenced. This would also depend on whether Grant's contributions were treated equivalently to Katharine's, consistently with the joint venture approach, or whether they were excluded, consistently with the approach if the home had been separate property other than a family home.

The quantum of relief that a court would grant under the Commission's proposed cl 44C would be deeply uncertain. Grant's children (the other beneficiaries) were not minors or dependent, so their interests could be discounted. Katherine's counsel would seek an award based on what Katharine would have received 'but for' the trust, which would be $91,000: half the gain in the value of the property during the qualifying relationship.[305]

Under the clause as modified by the proposals at VII above (shown in the appendix at 59 below) the situation would be altogether clearer. The compensation could not go

301 *Preston v Preston* (HC), above n 69, at [167].

302 At [167].

303 *Preston v Preston* (CA), above n 157, at [27].

304 *Preston v Preston* (HC), above n 69, at [77].

305 This would be the position according to Lau, above n 201, at 22.

beyond a counterfactual scenario in which the dispositions or contributions had not occurred. In that scenario the house would still have been substantially complete and owned by the trust, and so its increase in value would have been similar to the actual increase in value. Compensation would therefore be likely to be limited to the value of Katharine's contributions. However, a more likely scenario would be a finding that the benefits that she had received from the trust property already fully compensated her.

My proposed additions of subs (3) which requires the court to consider the relative status as beneficiaries of the partners relative to the other beneficiaries, and subs (4) which directs the court to consider the purpose of the trust, would also be important considerations. These factors were influential on the Court of Appeal's decision not to use its discretion to alter the trust under the Family Proceedings Act, because Grant gains no unfair benefit from having the home in the trust, which was placed there independently of the advent of Katharine.[306]

The Commission's drafting of cl 44C would lead a court away from this conclusion, in particular by encouraging the interests of Grant's children to be entirely disregarded because they are neither minors nor dependent. This is illustrative of the way that the proposals fail to consider the interests of beneficiaries other than the partners in the relationship before the court.

XI Conclusions and summary of proposals

The interface between other areas of law and trust law in New Zealand is not always an easy one. People will use trusts, where the law permits, to structure their property affairs in a way that delivers advantageous outcomes. Highly discretionary family trusts are unassailably entrenched in the political economy of New Zealand wealth-holding, and need to be approached in a principled way by legislation.

A decision must be made in each domain: will those associated with trusts be presumed to be "unprincipled and avaricious", as Wylie J suggested in *Petricevic*[307]? Or will trusts be treated as endowing their beneficiaries with meaningful rights coupled with enforcable fiduciary obligations? In the domains of legal aid, financial misconduct, and the proceeds of crime the former approach has a foothold. I have argued that more respect should be accorded to legal rights when new legislation is drafted to reform the regimes governing family property on separation and death.

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306 *Preston v Preston* (CA), above n 157, at [27].

307 *Petricevic v Legal Services Agency*, above n 120, at [50].

Unfortunately, while the Law Commission has proposed mitigating the unfairness of the current property division regime by recognising that the initial value of a pre-relationship home should stay as separate property, it has simultaneously eroded the integrity and separate property status of pre-relationship trusts. The new cl 44C it has proposed is over-inclusive and directs the court away from important considerations that are required to deliver just outcomes. In this paper I have proposed amendments to the remedy to bring it back in line with both trust principles, and with the treatment of separate property within the property sharing regime. I have also proposed complementary changes to extinguish the *Lankow v Rose*[308] cause of action where the situation is covered by the relationship property regime; a stricter definition of property; and improved contracting out provisions to reduce demand for trusts.

In its proposals on relationship property entitlements on death, the Law Commission has consulted on three options for dealing with property outside the estate. I have recommended that the less intrusive option be selected. Its review has also contributed useful ideas, such as a five year limit on clawing back dispositions of assets.

After reviewing the principles underlying trusts and the current statutory interventions in trusts in New Zealand, I have proposed a general methodology that can be used to value 'expectation' interests in discretionary trusts, for example where required by the Criminal Proceeds (Recovery) Act regime. This may also have utility in the context of family property dispute resolution.

The common theme in this analysis is that while recognising that, unlike creditors, "… spouses or partners … do not approach each other at arm's length",[309] there should still be as much alignment as possible between the treatment of trusts in a family property context and under the general law. To avoid bogging down families and the courts in unneeded litigation, certainty and clarity are needed to improve "law's capacity to communicate more directly with its subjects".[310] The unbounded discretionary approach used for social welfare would not provide this, and neither would the over-inclusive scope of the Law Commission's proposed s 44C. If the Commission's proposals are adopted with the amendments proposed in this paper, the result will be both to address the scenarios that lead to unfairness with the current law, while promoting certainty that will encourage families to resolve their relationship property affairs without recourse to the courts.

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[308] *Lankow v Rose*, above n 69.

[309] Peart, above n 73, at 570.

[310] Joanna Miles "Should the Regime be Discretionary or Rules-Based?" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge, UK, 2017) at 274.

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XIII Word count

The word count (excluding footnotes) of the paper body is 14,943 words.

XIV Appendix: Law Commission's draft s 44C (with proposed amendments)

The deletions proposed in section VII above are shown as strikeout, with proposed additions shown in square brackets and bold text.

44C Remedies when property held on trust

(1) This section applies if the court is satisfied that **[one of the following actions had the effect of defeating a claim or right of either or both of the partners under this Act]**—

(a) either or both of the partners to a relationship have, at any time when the relationship was reasonably contemplated, or at any subsequent time during or after the relationship, disposed of separate property or relationship property to a trust~~, and that disposition has the effect of defeating a claim or right of either or both of the partners under this Act~~; or

(b) trust property has been sustained by either or both of the following:

(i) the application of relationship property:

(ii) the actions of either or both of the partners during the relationship; or

(c) any enhancement of trust property (being an increase in the value of the property, or any income or gains derived from the property) is attributable directly or indirectly to either or both of the following:

(i) the application of relationship property:

(ii) the actions of either or both of the partners during the relationship.

(2) If the court considers it just in the circumstances, having regard to all relevant matters, including the matters in **subsection (3)**, the court may make 1 or more of the following orders **[provided, however, that the orders made may not go beyond restoring a partner to the position they would have been in had the disposition of property, application of relationship property, or action of a partner that defeated their rights referred to in subsection (1) not occurred]**:

(a) an order requiring one of the partners to the relationship (**A**) to pay to the other partner (**B**) a sum of money out of relationship property or separate property:

(b) an order requiring A to transfer to B any relationship property or separate property:

(c) an order requiring the trustees of the trust to pay to A or B, or both A and B, a sum of money:

(d) an order requiring the trustees of the trust to transfer to A or B, or both A and B, any trust property:

(e) an order varying the terms of the trust:

(f) an order resettling some or all of the trust property on 1 or more new trusts.

(3) The matters referred to in **subsection (2)** are,—

(a) if this section applies because of **subsection (1)(a)**,—

(i) the extent to which a claim or right of either or both of the partners under this Act has been defeated by the disposition of the property to the trust; and

(ii) the date of the disposition of the property to the trust; and

(iii) any benefits the partners have received from the trust, including the value of any consideration given for the disposition of the property to the trust; and

(iv) whether the disposition of the property to the trust was made with the informed consent of both partners; and

(v) whether the trust is intended to meet the needs of any minor or dependent beneficiaries; or

(b) if this section applies because of **subsection (1)(b) or (c)**,—

(i) the extent to which the trust property has been sustained or enhanced by the application of relationship property or the actions of either or both of the partners; and

(ii) the date or dates on which the trust property was sustained or enhanced by the application of relationship property, or the actions of either or both of the partners; and

(iii) any benefits the partners have received from the trust property, including the value of any consideration given for sustaining or enhancing the trust property, and

(iv) whether the trust property was sustained or enhanced with the informed consent of both partners; and

(v) whether the trust property is intended to meet the needs of any minor or dependent beneficiaries.

(c) [the relative value of each partners' rights and interests in the trust, along with the value of each other beneficiaries' interest, valued using the principle that in aggregate the value of all beneficiaries' interests (even if merely the value of the 'hope' of a discretionary beneficiary, which shall be valued) sum to the value of the trust; and]

(d) [the purpose of the trust, and all other matters that would be relevant considerations for the trustees were they to be deciding whether to make a distribution to each partner at the date of separation.]

(4) [This section does not apply unless, at the hearing date, a partner has benefited from the trust or is capable of being a beneficiary of the trust.]